Report on Contingency Fees

Submitted By:

The Law Society of Upper Canada
The Canadian Bar Association - Ontario
The Advocates' Society

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Ontario. Ministry of the Attorney General. Joint Committee on
REPORT ON CONTINGENCY FEES

To: The Honourable James M. Flaherty
Attorney General for Ontario

Sir:

As Chair of the Attorney General's Joint Committee on contingency fees, I have the honour of submitting to you our Committee's Report as authorized by the following organizations and their representatives:

1) George Hunter, Law Society of Upper Canada, and
2) Michael Eizenga, Advocates' Society.

I would also like to let you know that the members of the Committee and the Attorney General's staff have been invaluable in producing this Report.

Donald Kidd
Canadian Bar Association - Ontario

Attorney General's Joint Committee on Contingency Fees

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1. Introduction

The Report on Contingency Fees provides an overview of the use of contingency fee agreements in Canada and in other jurisdictions, examines the arguments for and against the use of contingency fees, and provides recommendations for the implementation of contingency fees in litigious matters in Ontario.

2. Definition

Contingency fee arrangements allow lawyers to fix in advance a percentage of the ultimate recovery in a legal action as their fee. If the case is successful, the client will be charged a pre-arranged premium fee; if the case is unsuccessful, the client will not be charged a fee. Contingency fee agreements may take various forms.

3. Background

Since 1975, there have been a number of reports on contingency fees. Most recent reports support the imposition of regulated contingency fees. In 1995, a private member's bill was introduced proposing that contingency fees be allowed. The Bill did not provide a regulatory scheme, and did not pass. In 1996, the then Attorney General, Charles Harnick, announced he hoped to introduce legislation by that Spring. In the fall of 1999, in response to expressed interest by the CBAO, Attorney General James M. Flaherty asked the LSUC, the CBAO and the Advocates' Society to prepare a discussion paper on contingency fees, in consultation with MAG. Environics was engaged to conduct a public opinion survey which found a high level of support amongst respondents.

4. Current Applicable Law in Ontario

In Ontario, contingency fees are prohibited by virtue of *An Act Respecting Champerty* and the *Solicitors Act*. The LSUC Rules of Professional Conduct prohibit lawyers from entering contingency fee agreements unless approved by statute.

The *Class Proceedings Act, 1992* permits contingency fees in relation to class proceedings. As well, "commission" or "percentage" agreements are permitted in relation to non-contentious business and conveyancing matters under s. 16 of the *Solicitors Act*.

Ontario courts have recognized the payment of a premium or success fee where a lawyer pursued a case for an impecunious client and there was a very real risk of an adverse finding on the issue of liability.

5. Other Jurisdictions

The Report examines the status of contingency fee agreements in the Canadian provinces, the United States, England and Australia. Every Canadian province, with the exception of Ontario, permits some form of contingency fee agreement.

II. Contingency Fees In Principle: Arguments For And Against

The major arguments in support of and in opposition to the introduction of contingency fees are set out below. These are fully analyzed in the Discussion Paper.

Pros:

(1) removes financial barriers to clients with meritorious claims
- *assists those ineligible for legal aid but cannot afford retainer & fees*

(2) minor impact on the justice system
- *indicated by empirical & anecdotal evidence*

(3) impact on legal aid
- *provides means of funding for types of actions no longer covered by legal aid*

(4) widespread acceptance
- *only prohibited in Ontario*

(5) consistent Canadian and international justice system
- *Ontarians would have access to legal representation on same basis as other Canadians*

(6) increased consumer choice and protection
- *protected by written contract, can "shop around"*

(7) public interest and good government
- *decreases number of "under the table" agreements*

Cons:

(1) clients end up worse off and lawyers end up with a windfall
- *preventable by fee reviews and caps on fees*

(2) "stirring up" litigation
- *prevented by threat of costs awards; disincentive to bring frivolous action where only paid upon success*

(3) volume of trials
- *little empirical research; discouraged by threat of costs awards*

(4) inflated damage awards
- *prevented by caps on damages*

(5) unethical practices
- *addressed by current remedies and penalties; also deterred by threat of costs against solicitor personally*

(6) solicitation by lawyers
- *no empirical research; may be greater incentive for solicitation; may be countered by common law rule against maintenance (civil wrong for lawyers to promote unnecessary litigation)*

(7) conflict of interest
- *fear that lawyer will not remain objective in settlement negotiations; however, potential conflict exists currently, where fee forms part of settlement; 95% of matters don't go to trial because in best interests for all to settle early*

(8) clients must be properly informed about their liability for costs
- *fear that consumers may be misled; can be countered by mandatory disclosure requirements*

III. Implementation Of Contingency Fees - Proposed Controls And Safeguards

The Report examines which controls and safeguards could be imposed to regulate contingency fees; and who should be responsible for imposing and enforcing them. A number of options are explored. The Report makes the following recommendations:

1. Prohibit contingency fees in criminal and quasi-criminal law matters.

2. Prohibit contingency fees in family law matters.

3. Do not prohibit contingency fee contracts with minors and persons under legal disability.

4. Prohibit lawyers from collecting both costs and a proportion of the amount recovered, unless approved by a court.

5. Impose a legislated cap on contingency fees.

6. Impose a maximum allowable percentage fee of 33 1/3% of the client's total recovery (excluding any cost contribution or award) by settlement or trial judgement. A contingency fee arrangement greater than the maximum percentage fee must be approved by a judge of the Superior Court by application of the lawyer and client in order for it to be enforceable and if not so approved the retainer is unenforceable.

7. Give judges the authority to review contingency fee contracts.

8. Impose the following timelines on judicial review of contingency fee contracts: either on application of both a client and lawyer (within a specified period of time) after entering into a contingency fee agreement that is greater than the maximum percentage fee, or where the fee is at or below the maximum percentage fee on application of a client for review within the same timelines that apply to a client assessment of a fee account pursuant to the provisions of the *Solicitors Act*.

9. Require all contingency fee contracts to contain prescribed standard terms and to omit prohibited terms.

10. Retain government control over the regulation of contingency fee contracts.

I. CONTINGENCY FEES: BACKGROUND AND STATUS

1. Introduction

The purpose of this report is to provide an overview of the use of contingency fee agreements in Canada and in other jurisdictions, to examine the arguments for and against the use of contingency fees, and to provide recommendations for the implementation of contingency fees in litigious matters in Ontario.

With the notable exception of Ontario, all of the provinces and territories in Canada permit contingency fee agreements. Unfortunately, there is a dearth of data regarding the impact of contingency fees on improving access to justice, on the civil caseload and on plaintiffs' net recovery. The lack of data with respect to the civil caseload is partly attributable to the fact that contingency fees were introduced in these jurisdictions at a time when detailed court records were not always kept.

Even in the United States, where innumerable articles have been written about contingency fees, there is a lack of systematic studies or empirical data to support either side of the debate. Throughout the past few decades, numerous governments in Ontario have been skeptical about the need for permitting contingency fees. This uncertainty and hesitation is well reflected in the current status of law in Ontario, where contingency fees are permitted in class proceedings but are statutorily prohibited in all other litigation; however, in a few cases, the courts have come close to permitting contingency fees by allowing increased legal fees for the winning party.

2. Definition

Contingency fee arrangements allow lawyers to fix in advance a percentage of the ultimate recovery in a legal action as their fee. If the case is successful, the client will be charged a pre-arranged premium fee; if the case is unsuccessful, the client will not be charged a fee. The most common type of contingency fee arrangement is the percentage fee agreement, where the lawyer receives an amount calculated as a percentage of the amount awarded by the court. Other variations on contingency fee arrangements include:

1) a speculative fee agreement - where the lawyer receives the usual fee only if the action is successful; and
2) an uplift fee (or conditional fee) arrangement - where the lawyer receives, in addition to his or her usual fee, an agreed flat amount or percentage uplift of the usual fee if the action is successful.

In percentage fee agreements, the lawyer's fee may be calculated in one of the following ways:

- a flat percentage of the recovery,
- a flat percentage of the recovery above a stated amount,
- a series of increasing or decreasing percentages depending on the size of the recovery, or
- a series of percentages based on the stage at which the case is settled.

In addition to receiving fees for legal services provided, lawyers also bill clients for the out-of-pocket expenses incurred in pursuing their claims, such as long distance telephone charges, postage, photocopying, court fees, discovery expenses, expert fees and medical reports. Under a contingency fee agreement, a lawyer's recovery for legal services and disbursements may be calculated as a percentage of the client's recovery or a lawyer's fee for legal services may be calculated as a percentage of the client's recovery and the disbursements billed separately. In most of the other provinces, lawyers and their clients are free to agree on a case by case basis whether or not to include disbursements as part of the contingency fee. In percentage fee agreements, for example, the percentage fee would be lower if the client paid for disbursements separately and higher if disbursements were included as part of the fee.

3. Background.

In 1975, the Law Society of Upper Canada ("LSUC") appointed a Special Committee to study contingency fees. In its 1976 report, the Special Committee recorded its surprise that, after being asked by the office of the Attorney General to give the LSUC's views of the use of contingency fees in Ontario and before receiving its recommendation, the Attorney General went on record stating that he was opposed to letting Ontario lawyers share in awards their clients won in court actions.[1]

In reviewing submissions, the Special Committee noted that the preponderance of briefs opposed any change in legislation. Medical source briefs stated that there was a correlation between inflated awards in medical malpractice lawsuits and high medical malpractice insurance premiums.[2] However, the question remained whether there was ground not being covered by Legal Aid which could be covered by permitting contingent fees.

In light of the position taken by the Attorney General and the opposition of the briefs, however, the Special Committee recommended that consideration of the question of contingency fees, which would require extensive study, should not be proceeded with at that time.[3]

Five years later, in April 1980, the *Report of the Professional Organizations Committee,* was released.[4] The Professional Organizations Committee was formed to review the statutes governing the professions of public accounting, architecture, engineering, and law "with a view to making recommendations to the Government for comprehensive legislation setting the legal framework within which these professions are to operate."[5] In order to fulfil its broad mandate, the Committee asked the three members of its Research Directorate to prepare a Staff Study analyzing all of the issues before it and advancing their own concrete proposals.[6] The resulting book, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario,* by Michael J. Trebilcock, Carolyn J. Tuohy and Alan D. Wolfson, was published in January, 1979.[7]

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[1] Law Society of Upper Canada, Appendix B to the Research Directorate's Staff Study, *History and Organization of the Legal Profession in Ontario*, 1978.
[2] *Ibid.* at 151.
[3] *Ibid.* at 152.
[4] Ontario, *Report of the Professional Organizations Committee* (1980) [hereinafter *Professional Organizations*].
[5] *Ibid.* at ii.
[6] *Ibid.* at 2.
[7] M.J. Trebilcock, C.J. Tuohy and A.D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario* (Government of Ontario, 1979) [hereinafter *Staff Study*].

In the *Staff Study*, it is argued that the sweeping rejection of contingency fee arrangements in principle often advocated by critics seems unreasoned. First, it is argued that six provinces permit contingent fee arrangements without apparently producing the "social hari-kari" forecast by some critics.[8] Second, that even in jurisdictions which do not permit contingency fees, some civil litigation is *de facto* conducted on such a basis.[9] Third, and more importantly, that:

> ... throughout our economy we observe specialized risk bearers, for example, insurance companies, mutual funds, manufacturers through product warranties, offering to assume risks – at a price – that other people would prefer not to bear. By specializing in risk bearing, these firms are able to diversify away some of the risks assumed in a way that the individual risk bearer is commonly unable to do. The lawyer under a contingency fee arrangement is performing much the same function. In return for the prospect of a higher fee in the event of a successful suit, he agrees to absorb all his own costs in a losing suit and absolve his client from them. In principle, it is not at all clear why this should be objectionable.[10]

After the release of the *Staff Study*, public briefs were solicited and public meetings scheduled by the Professional Organizations Committee. The submissions received on contingency fees were almost unanimous in being opposed to their introduction in Ontario. Professionals outside the legal profession argued that contingency fees would tend to encourage frivolous litigation, spawn dubious malpractice suits, make the cost of malpractice insurance horrendous, and increase the cost of legal services to those clients who would be engaging lawyers through normal retainers.[11] The submissions of the LSUC and the Ontario Branch of the Canadian Bar Association ("CBAO") were more specific but equally opposed.[12]

The LSUC's brief pointed out that a contingent fee system would work to the detriment of the client who, under the American system, signs away 35% to 40% of the recovery as opposed to the net recovery by clients in Ontario of something closer to 85% of the overall recovery, and rarely less than 75%.[13] The CBAO's brief stressed the further point that the contingent fee system is only relevant to a damage action and not to the multitude of other types of civil litigation. In addition, the brief pointed out that:

> ...not all claimants are meritorious by virtue of their poverty, nor are they deprived of their opportunity to take their claims to court. In this jurisdiction, people who have a meritorious claim and who are poor can always obtain legal aid. If the claim is meritorious enough, there is in practice what the Staff Study refers to as *de facto* contingent fees. If one is referring to the middle class as opposed to the poor, there are very few lawyers who would not conduct a meritorious case with a modest advance on account of disbursements. If a contingent fee system is designed to expand this *de facto* situation to cover the less meritorious cases, there would be a corresponding increase in the number of people exposed to non-meritorious cases....[14]

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[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.* at 320-1.
[11] *Professional Organizations*, *supra* note 4 at 208.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*

The representatives of the legal profession submitted further that "[a]n examination of experiences in provinces which do have contingent fees coupled with a legal aid system demonstrated that the impact of the contingent fee system has been almost undetectable and ... that it seemed futile to be engaged in an extensive debate about the merits of a topic which is of no practical interest."[15]

The Professional Organizations Committee concluded that "[t]here should be no relaxation of the current prohibition of contingent fees as a payment mechanism for legal services in Ontario."[16]

The issue of whether to introduce contingency fees arose once again in 1988 when both the CBAO and the LSUC prepared reports this time *supporting* the implementation of contingency fees in Ontario.[17]

The CBAO concluded that a contingent fee for services should be an option available to clients in Ontario. However, it recommended that contingent fees should be prohibited in the areas of family and criminal law. The CBAO also concluded that the client should have an investment in the lawsuit and should therefore be liable for all ongoing disbursements, court costs and other expenses of litigation as the action progresses. This financial participation by the client would work to discourage totally frivolous or marginal cases and it would, as it does now, encourage settlement. These costs, expenses and disbursements should be paid by the client even if the action is unsuccessful. For a more detailed summary, please see Appendix I.

The LSUC adopted the proposal of its Special Committee on Contingency Fees, which this time recommended the use of contingency fees in all matters except for criminal cases and matrimonial proceedings that did not involve the collection of arrears in support payments. The Special Committee recommended a limitation on the use of contingency fees in litigation matters in "a court or administrative proceeding where the remedy sought is other than damages or other pecuniary compensation", but this recommendation was rejected by the LSUC.[18] It also recommended that the issue of whether or not disbursements should be subject to the contingency, or should be paid by the client in any event, should be a matter left to be agreed upon between the lawyer and the client.

In its report, the Special Committee also concluded that:

> "Many lawyers in Ontario are already operating on a de facto contingency basis; that is, many lawyers take no retainers because their clients are unable to finance the litigation including the payment of disbursements and their clients are incapable of paying their fees and disbursements if they are unsuccessful in the litigation process."[19]

This is risky for both lawyers and clients because these agreements are unwritten and in the event of a dispute there is little, if any, documentary evidence available to assist either party enforce the original terms of the contract.

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[15] *Ibid.* at 209.
[16] *Ibid.* at 212.
[17] Canadian Bar Association – Ontario, *Report on Contingency Fees* (June 10, 1988) [hereinafter *CBAO Report*]; Law Society of Upper Canada, *First Report of the Special Committee on Contingency Fees* (May 27, 1988) [hereinafter *LSUC First Report*].
[18] *LSUC First Report*, *ibid.* at 6. Recommendation rejected by Convocation on May 27, 1988.
[19] *Ibid.* at 1.

The value of contingency arrangements was recognized by the 1990 Prichard Report on Health Care Liability Issues, which recommended their use as one way to increase access to the civil justice system for patients with medical malpractice claims.[20] This report found no evidence of abuse of contingency fees in the Canadian context and no basis for prohibiting them.

Contingency fee arrangements are permitted under Ontario's 1992 *Class Proceedings Act*, which allows lawyers to enter into written agreements with their clients for payment only in the event of success.[21] Class action litigants therefore have increased access to the civil justice system through a mechanism not currently available to individual claimants

In 1992, the LSUC amended its Special Committee's 1988 recommendations by rejecting the use of contingency fees in matrimonial matters involving the collection of arrears in support payments.[22] The effect of the 1988 proposal and the 1992 amendments was that the LSUC proposal recommended the use of contingency fees in all matters except matrimonial and criminal proceedings (see Appendix I for a more detailed summary).

A central feature of the scheme recommended in the 1992 LSUC proposal is the "costs plus" principle which provides that where a plaintiff has entered into a contingent fee agreement, the solicitor should be entitled to receive party and party costs in addition to the agreed percentage of the amount recovered.[23] On the assumption that such an entitlement would be included in the scheme, the Special Committee recommended that a contingent fee agreement should not permit the lawyer to receive more than 20% of the amount recovered (subject to court-approved exceptions in special cases).[24]

The issue of contingency fees was raised again in the First Report of the Ontario Civil Justice Review.[25] The Government of Ontario and the Ontario Court of Justice (General Division), in co-operation with the Bar, agreed to undertake a broad review of the civil justice system in Ontario to develop an overall strategy to provide a speedier, more streamlined and more efficient civil justice system. In the *First Report*, the Civil Justice Review recommended that contingency fees be revisited as a means of enhancing access to justice.[26]

In October 1995, a private member's bill (Bill 3) was introduced by Mr. Chiarelli, proposing that contingency fees be allowed. The bill did not set out a detailed regulatory scheme.

In January 1996, the then Attorney General, Charles Harnick publicly announced that he was examining the implementation of a contingency fee scheme in Ontario and hoped to proceed with Spring legislation.

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[20] R. Prichard, *Liability and Compensation in Health Care* (1990).
[21] S.O. 1992, c. 6, s.33; *Nantais* v. *Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Gen. Div.), leave to appeal to the Court of Appeal denied; and *Crown Bay Hotel Ltd. Partnership et al.* v. *Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Gen. Div.).
[22] Law Society of Upper Canada, *Third Report of the Special Committee on Contingency Fees* (July 10, 1992).
[23] *Ibid.* at Appendix "A".
[24] *Ibid.* at Appendix "B".
[25] Ontario Court of Justice and the Ministry of the Attorney General, *Civil Justice Review: First Report* (March, 1995) [hereinafter *First Report*].
[26] *Ibid.* at 148.

In 1997, the Ontario Legal aid Review Report recommended that the Ontario government introduce legislation that allows for regulated contingent-fee arrangements for lawyers in Ontario.[27] The Report noted that over the past years, certificate coverage has been eliminated for most civil law matters.[28]

In September 1999, the CBAO expressed an interest in contingency fees. In response, the new Attorney General, James M. Flaherty, directed staff of the Ministry of the Attorney General to provide support to the CBAO, LSUC, and the Advocates' Society in preparing a discussion paper on contingency fees.

In March 2000, the LSUC, CBAO and the Advocates' Society engaged Environics to conduct a public opinion survey regarding contingency fees. The survey found that:

- 46% of respondents said a lawyer's fee has a major impact on their decision to hire a lawyer whereas 20% said it has little or no impact.
- After explaining to those surveyed how contingency fees operate, 70% of respondents strongly or somewhat agree that the Ontario government should allow people to hire lawyers on a contingency fee basis.
- 49% are more supportive of contingency fees if they feel that they could afford the services of a lawyer for a court case.
- 48% are more supportive of contingency fees if there is legislation that would limit the percentage of a settlement that a lawyer would be permitted to take.
- 45% are more supportive of contingency fees if there is legislation that would give clients, in the event of a dispute, the right to ask a judge to review their contingency fee arrangements.

After being asked a series of questions about contingency fees, the level of support amongst respondents increased to 75%.

4. Current Applicable Law in Ontario

The common law initiated prohibitions against maintenance and champerty which, in effect, prohibited contingency fee arrangements. Maintenance occurs where a person supports litigation in which he or she has no legitimate concern without lawful justification. It is confined to "officious intermeddling" – that is, "something against good policy and justice, something tending to promote unnecessary litigation."[29]

Champerty is a form of maintenance where assistance is given in return for a share in the proceeds expected to be realized once the matter has been resolved.[30] The common law condemned champerty because of specific abuses it might encourage, such as the temptation of the maintainer to encourage the litigant to inflate damages or suppress evidence for his own personal gain, or in some cases, to suborn witnesses.

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[27] Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services*, 1997
[28] *Ibid,* at 216.
[29] *Neville* v. *London "Express" Newspaper, Ltd.*, [1919] A.C. 368 at 370-1.
[30] *CBAO Report*, *supra* note 17 at 13.

Champerty and maintenance were removed from the Criminal Code in 1955, but they remain civil wrongs throughout Canada. In Ontario, *An Act Respecting Champerty* provides that:

> 1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
> 2. All champertous agreements are forbidden, and invalid. [31]

In *Stribbell* v. *Bhalla,* Osborne J held that "contingency fees are prohibited in Ontario by *An Act respecting Champer*ty."[32]

Most provinces prohibit champertous contracts but exclude contingency fee contracts from that prohibition. Ontario does so only in relation to class proceedings. Sections 33(1) and (2) of Ontario's *Class Proceedings Act, 1992* state that despite the *Solicitors Act* and the 1897 *Champerty Act*, there can be an agreement between a solicitor and a representative party for the payment of fees and disbursements only in the event of success.[33]

In addition to *An Act respecting Champerty*, contingency fees are "at least impliedly prohibited by [section 28] of the *Solicitors Act*."[34] Section 28 governs the validity of agreements between lawyers and clients where the lawyer is paid only if the action succeeds or where payment is a percentage of recovery.

> 28. Nothing in sections 16 and 33 gives validity to a purchase by a solicitor of the interest or any part of the interest of his or her client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him or her is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.[35]

"Commission" or "percentage" agreements are permitted in relation to non-contentious business and conveyancing matters under section 16 of the *Solicitors Act.*

In the *Rules of Professional Conduct,* the LSUC prohibits lawyers from entering into contingency fee agreements unless approved by statute:

> Rule 9, para. 10. A lawyer should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject matter of litigation being conducted by the lawyer. It is improper for the lawyer to enter into an arrangement

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[31] R.S.O. 1897, c. 327.
[32] (1990), 73 O.R. (2d) 748 (Gen. Div.); [1990] O.J. No. 999 (QL) [hereinafter *Stribbell* cited to QL].
[33] S.O. 1992, c. 6.
[34] *Stribbell*, *supra* note 32 at 3.
[35] R.S.O. 1990, c. S.15.

> with the client for a contingent fee except in accordance with the provisions of the *Solicitors Act* or in accordance with the *Class Proceedings Act, 1992.*[36]

The common law and statutory prohibitions stem from a concern that contingency fees may offend the normal rules governing the special relationship that exists in law between a solicitor and his client.[37] The special relationship "is one of complete good faith, openness in dealing with, and devotion to the client's cause."[38] The result of this fiduciary relationship is that "the lawyer must act in utmost good faith towards his client and indeed, is duty bound to disclose and disgorge any profit he makes from the relationship."[39]

Despite the fact that contingency fees are prohibited, Ontario courts do recognize the payment of a premium or success fee where a lawyer pursued a case for an impecunious client and there was *a very real risk of an adverse finding on the issue of liability* (emphasis added). The court relied on the factors that the Assessment Officer considers in taxing a solicitor's account as the basis for awarding solicitors a fee based on the degree of success achieved. These factors are:

(a) the time and effort required and spent;
(b) the difficulty and importance of the matter;
(c) whether special skill or service has been required and provided;
(d) the amount involved or the value of the subject matter;
(e) the results obtained;
(f) fees authorized by statute or regulation or suggested fee schedule of a law association;
(g) such special circumstances as loss of other employment, *uncertainty of reward* or urgency.[40]

In *Stribbell,* Osborne J. held that it was not champertous to award successful counsel a fee in excess of the assessed party-and-party costs. Osborne J. held as follows:

> I recognize that, at least for now, the Legislature seems to have proceeded on the basis of a policy to provide legal services to those of modest means publicly and directly by way of legal aid, rather than privately and indirectly by allowing contingent fees. A gap, however, remains. Mr. Stribbell is not eligible for legal aid, but at the same time, Mr. Stribbell does not earn a sufficient income to permit him to finance this kind of litigation. I think in these circumstances the court is entitled to intervene. Justice requires that deserving actions be prosecuted by competent counsel and competent counsel are entitled to be paid a reasonable fee for the value of the work done. The infant plaintiff is not bound by any pre-existing or existing

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[36] Law Society of Upper Canada, *Professional Conduct Handbook* (1999) at 25 [hereinafter *LSUC Rules*]. This rule may be slightly revised by the proposed new *Rules of Professional Conduct.* The new Rules 2.08(3) and (4) provide: (3) "A lawyer shall not, except as expressly permitted by law, acquire by purchase or otherwise any interest in the subject matter of litigation being conducted by the lawyer", and (4) "A lawyer shall not enter into an arrangement with the client for a contingent fee except in accordance with the provisions of the *Solicitors Act* or in accordance with the *Class Proceedings Act, 1992.*"

[37] *Professional Organizations*, *supra* note 4 at 211.

[38] *Ibid.*

[39] *Ibid.*

[40] *LSUC Rules*, *supra* note 36; and *Cohen* v. *Kealey* (1985), 10 OAC 344 at 346 (C.A.).

> understanding as to the fee entitlement of plaintiff's counsel. It is for that very reason that the court is required to intervene.[41]

Stribbell was followed by a unanimous Court of Appeal judgment in *Desmoulin* v. *Blair*.[42] Here, Austin J.A. stated that until contingency fees are implemented in Ontario "there will remain a 'gap' between litigation which can be prosecuted or defended under legal aid and that which is funded by the litigants themselves."[43] He held that a risk premium should not be granted by the courts automatically, but should be granted where there was a very real risk of an adverse finding on the issue of liability. He further stated:

> The "work done" in the case of this kind of lawsuit, from any realistic perspective, includes not just the initiative to institute and prosecute the lawsuit, but to do so upon the basis that no fees can be recovered during the process, or possibly ever, and that the expenses which may be, and in this case, were, very substantial, will be carried one way or another, by the solicitor. As it is important that this kind of work be undertaken so as to provide access to our courts for legitimate claims, it must be encouraged in appropriate ways. One such way, in my opinion, is to recognize it in the assessment of fees. This is not to permit or to license contingency fees. Rather, it is to support the undertaking of certain kinds of litigation while maintaining the control of fees by the court.[44]

The court awarded fees of approximately 31% of the total recovery, a rate very close to what is deemed acceptable where contingency agreements are legal.

In *McGregor* v. *Crossland*, the plaintiff was unable to pay counsel's fees and was unable to pay more than a tiny portion of the disbursements that were being incurred.[45] After obtaining a favorable result for the client, plaintiff's counsel sought a premium over and above the total expended time to reflect the legal complexity, the importance of the matter to the client, the results achieved and the ability of the client to pay. The court awarded a premium or success factor of 30% on the hourly rates charged by plaintiff's counsel.[46] Taliano J. stated:

> This was a meritorious claim but would never have been vindicated if counsel had not diligently and persistently pursued it, without compensation, with a dedication that should be applauded. His efforts on behalf of his client, which are meticulously detailed in his materials, must therefore be suitably rewarded.... In this case, if counsel had not bravely undertaken and persevered with this case, in spite of its great complexity, it is quite possible that no other counsel in this region would have assisted her and a valid claim would have gone unrequited.[47]

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[41] *Stribbell*, *supra* note 32 at 6.
[42] (1994), 120 D.L.R. (4th) 700 (C.A.); [1994] O.J. No. 2835 (QL) [hereinafter cited to QL].
[43] *Ibid.* at 1.
[44] *Ibid.* at 5-6.
[45] [1998] O.J. No. 2017 (QL).
[46] *Ibid.* at 13.
[47] *Ibid.* at 10.

5. Other Jurisdictions

(1) Canadian Provinces

With the exception of Ontario, contingency fees are permitted in every jurisdiction in Canada. Most provinces have allowed contingency fees for the past 30 years; Manitoba has allowed them since 1890.

There appear to be very few problems associated with contingency fees or incidents of abuse. In British Columbia, for example, the Law Society concluded in a 1989 report that:

> Contingent fee agreements are unquestionably in the public interest, and on a pragmatic level they work. They are widely used in personal injury cases and yet complaints about them are rare.... The Committee's report does not document any abuse of contingent fee agreements. The rarity of complaints to the Law Society and of taxations under section 78(9) of the *Legal Profession Act* is eloquent evidence that there is not a problem.[48]

There is little empirical data on the impact of contingency fees on court intake. Some information regarding court intake can be inferred from the results of a survey of lawyers in Ontario and British Columbia regarding contingency fees conducted by Douglas J. Cumming, Jacob S. Ziegel and Michelle M. Cook.[49] One of the survey questions asked lawyers how they deal with impecunious plaintiffs and those not willing to assume the costs of litigation.[50] In British Columbia, 85.2% of the respondents indicated that they would receive a percentage of the sum recovered in the action.[51] In Ontario, 32.4% of respondents indicated that they would be paid their hourly rate if the action was successful or settled out of court and 24% of respondents indicated that they would refuse to act.[52] Only 7.7% of respondents in British Columbia indicated that they would refuse to act.[53] If contingency fees are permitted in Ontario, the number of Ontario lawyers who would refuse to act may drop from 24% to closer to 7%, resulting in a corresponding increase in the number of civil cases.

Anecdotal information suggests that contingency fees do not have a significant impact on court caseloads. In "Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario", Herbert M. Kritzer noted that "none of my respondents, many of whom are executives in corporations with major operations in provinces where contingent fees are permitted, made any mention of a greater litigiousness among the residents of the areas with contingent fees."[54]

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[48] D. Mitchell, *Law Society of British Columbia Submission to the Justice Reform Committee* (1989) at 29-30.

[49] D. Cumming, J.S. Ziegel and M.M. Cook, "An Empirical Perspective on the Interplay between Contingency Fees and the Legal System" (Law and Economics Working Paper Series, University of Toronto, 1996) [hereinafter, the *Cumming Report*]. This survey of lawyers in British Columbia and Ontario is the only empirical study on contingency fees in Canada. The paper has not been published because, among other things, the sample size of the survey was considered too small to draw statistically conclusive results. There were 225 respondents to the Ontario questionnaire and 156 respondents to the British Columbia questionnaire.

[50] *Ibid.* at 11.

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*

[54] Law and Contemporary Problems (Vol.47: No.1, 1984) 125 at 130 [hereinafter "Fee Shifting"].

Throughout Canada, a range of safeguards exist to protect clients and ensure that lawyers do not charge excessive fees. These include rules to regulate the form and content of the contingency fee contract, restrictions on the use of contingency fees in certain types of cases (e.g. criminal and family), and procedures to review contingency fees. A summary of other provincial contingency fee schemes is provided at Appendix II.

Two key features of the Canadian justice system which are absent in the United States also act as safeguards to prevent the volume of litigation and inflated damage awards associated with contingency fees in the American context. These are (a) the Canadian "party and party" costs rule requiring the loser to pay the winning side's costs and (b) the limit which has been placed on damage awards for non-economic losses.

(a) **Costs follow the event**

In Canada, the issue of costs and their award is in the discretion of the judge. The normal rule is that costs follow the event, i.e. the loser pays the costs of the winning side. Those costs are payable on one of two scales as awarded by the Court, either on a party and party basis, or on a solicitor and client basis. Normally, costs are awarded on a party and party basis. [55] Costs cover expenses such as court filing fees, expert's reports, lawyer's fees and other expenses of a lawsuit.

In extenuating circumstances, in particular when the Court wishes to express its displeasure, costs are awarded on a solicitor and client scale. In addition, in Ontario, there are certain provisions that apply to Offers of Settlement that may result in a mandatory Order of costs on a solicitor and client scale. Typically, costs awarded on a party and party basis approximate one-half of the actual legal bill received by the client. Solicitor and client costs on the other hand come close to a complete indemnification.

The fact that a losing plaintiff may have to pay the defendant's legal costs would not change under a contingency fee system. Claims without merit would continue to be deterred because the contingency fee arrangement only relieves the losing party of the obligation to pay his or her own lawyer. All other existing controls on frivolous and vexatious claims would remain operative.

In the United States, the concept that a losing party may expect to pay the costs, usually on a party and party basis, of the winning party, does not exist. Instead, parties are generally responsible only for their own costs. The fact that American plaintiffs do not face a similar "downside risk" has had a significant impact on the volume of litigation in the United States.

(b) **The Canadian limit on damage awards**

The Supreme Court of Canada has limited the amount of court awards for non-economic losses (pain and suffering, loss of amenities, reduced life expectancy) to $269,000 in 1999 dollars.[56] No such limit exists in the United States, where awards for non-economic losses and punitive damages can run into the millions of dollars. In Canada, punitive damages are awarded very rarely and the awards are generally much lower than in the United States.[57]

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[55] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.131(1); Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (as amended), Rule 57.

[56] *Andrews* v. *Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Lindal* v. *Lindal,* [1981] 2 S.C.R. 629.

[57] See *infra* note 1134.

Other safeguards in place across Canada are the high quality of legal education and active regulation of professional conduct and practise management. All of the law schools across Canada offer a consistent curriculum and a high quality legal education. Law societies across Canada also actively supervise the profession and take disciplinary action where appropriate. By contrast, in the United States, standards of legal education vary significantly as does the quality of legal services. For example, some lawyers in the United States do not have the skills to take a case to trial and so instead they solicit cases and then sell them to other lawyers who have the expertise to pursue the claims.

(2) United States

Contingency fee contracts have been recognized as valid since 1853 by the United States Supreme Court, and are permitted at both the federal and state level.[58]

The use of contingency fees is regulated by a combination of professional conduct rules and statutes. The vast majority of states base their professional conduct rules on the American Bar Association (ABA) Model Rules of Professional Conduct, which place few restrictions on the use of contingency fees. These include prohibiting contingency fees in family and criminal matters, minimal regulation of the form and content of contracts, and a requirement that fees be reasonable. A number of states also place caps on the percentage a lawyer may charge.

A detailed review of the ABA Model Rules, along with contingency fee regulation in California, Florida, Illinois, and New York State is attached at Appendix III.

As indicated above, the American civil justice system does not have in place the types of control that are present in Canada which deter low merit lawsuits and limit the size of damage awards. In addition, American attorneys have traditionally had much greater freedom to advertise aggressively than their Canadian counterparts. These factors have all contributed significantly to the volume of lawsuits and high damage awards often associated with contingency fees in the United States.

In terms of litigation against public authorities, however, it is important to note that many states have maintained the sovereign immunity of state governments and agencies, and have legislated immunity or caps on damages for municipalities and local boards. The following are some examples of the types of limits on liability of public authorities that are common in the United States:

- Many states have limited the extent to which defendants can be held jointly and severally liable. For example, the states of Alaska and Colorado have abolished joint and several liability entirely, the state of Hawaii has abolished joint and several liability for all government entities and many states have limited the application of joint and several liability.

- Many states have imposed caps on damages that can be awarded against states, state agencies and municipalities. For example, the state of Minnesota limits the liability of municipalities to $200,000 per claim (including claims for wrongful death) and to $600,000 for all claims arising out of a single occurrence.

[58] *Wylie* v. *Coxe* (1853), 15 How. 415.

While public authorities in the United States have some protection against high damage awards, they are also exposed to more risk because cases against them may be determined by juries. In Ontario, trial by jury is prohibited where a party is seeking relief against the Crown or a municipality[59]. In the United States, damage awards granted by a jury are generally higher than those granted by a judge. According to a survey of the 75 largest counties in the United States, the median total award for plaintiff winners in jury cases was $35,000 and in non-jury cases, $28,000.[60] In several types of cases, juries more often than judges awarded damages of $1 million or more.[61] Juries awarded $1 million or more for damages in 22% of medical malpractice cases and 14% of employment discrimination cases;[62] in contrast, judges did not award more than $1 million in total damages in either of these kinds of cases.[63]

(3) England

In 1990, the *Courts and Legal Services Act* introduced conditional fees in England, except in family and criminal proceedings.[64] As discussed in the definition section, conditional fees allow a lawyer to recover his or her normal fees plus a success uplift. Conditional fees appear to reflect some of the case law in Ontario, which permits a "premium" or "success factor" in a solicitor and client bill in certain circumstances.

The 1990 *Courts and Legal Services Act* empowered the Lord Chancellor to make Orders specifying the proceedings in which agreements could lawfully be made. The first Order was made in 1995, allowing conditional fee agreements for proceedings involving personal injury, insolvency, and cases before the European Commission and the European Court of Human Rights.[65] The maximum amount of success fee a lawyer may charge was set at 100% of the lawyer's normal fees for the work undertaken. Although the lawyer can agree to fund the costs of disbursements as part of the agreement, disbursements are not eligible for the uplift. There is also the option of entering into an insurance scheme for clients to cover their disbursements and their opponent's costs.

Since the introduction of conditional fees in 1995, the Law Society has advised solicitors that the *voluntary* limit on the proportion of damages that could be taken by the success fee should not be more than 25%. While a lawyer may charge a 100% fee uplift, the Law Society recommends that this fee should not amount to more than 25% of his or her client's recovery.

In September 1997, the Policy Studies Institute (PSI) reported in *The Price of Success* that an uplift of 90-100% was charged in one-tenth of cases, and the average uplift charged by solicitors in the study was 43%.[66] (The study was based on a review of 200 conditional fee agreements (CFAs) from 121 firms in England.)

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[59] *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s.11; and the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.108(2).

[60] United States Department of Justice, "Civil Trial Cases and Verdicts in Large Counties, 1996" in Bureau of Justice Statistics Bulletin (September, 1999) at 1 [hereinafter "Civil Verdicts"].

[61] *Ibid.* at 9.

[62] *Ibid.*

[63] *Ibid.*

[64] *Courts and Legal Services Act, 1990*, s.58. For a discussion of conditional fees in England, see U.K., Lord Chancellor's Department, *Conditional Fees: Sharing the Risks of Litigation* (September, 1999); and see the Government's conclusions following consultation in *Conditional Fees: Sharing the Risks of Litigation* (February, 2000).

[65] The Conditional Fee Agreements Order 1995.

[66] Stella Yarrow, *The Price of Success*, PSI, cited in Zander, Michael, "Two Cheers for Conditional Fees – Maybe" (1997) 147 New Law Journal, 1438 at 1438.

In addressing the PSI report, Geoff Hoon, MP Parliamentary Secretary at the Lord Chancellor's Department, stated:

> I would like to begin to consider at least other funding mechanisms such as contingency fees to see if they may be a possible way forward. As I have mentioned, in the vast majority of cases surveyed, 97% in fact, the solicitor's uplift was limited to 25% of the damages. As the PSI report says, the use of this cap "would indicate that a drift may occur towards contingency fees even if they are called conditional fees in name".[67]

Some of the provisions governing conditional fee agreements were amended in 1999 by the *Access to Justice Act*.[68] This *Act* extends the availability of conditional fee agreements in the context of "modernizing legal aid" so that cases that can be privately funded are no longer covered by legal aid.[69] The *Act* allows courts to order that a successful litigant recover the success fee and insurance from the losing party.[70] This is in response to arguments that both types of costs are incurred directly because the loser has put the successful party to the cost of taking court proceedings, and that they should be recoverable in the same way that other costs are recoverable. Allowing the litigant to recover his success fee from the losing party enables him to keep all the money he has been awarded by the court, making conditional fees more attractive. The *Act* also allows a party to be funded by a trade union or other prescribed group, and allows such a group to recover from the opponent a sum in recognition of this liability.[71]

(4) Australia

Some jurisdictions in Australia permit an uplift fee in certain types of work. A 25% uplift fee is allowed in New South Wales and Victoria:[72] A 100% uplift fee is allowed in South Australia: r.8.10 *Professional Conduct Rules*. In Queensland, a 50% uplift fee is allowed:[73] In Tasmania, the charging of uplift fees by barristers is expressly prohibited:[74] In the remaining jurisdictions, uplift fee agreements may amount to champerty.

In its recent *Review of the Federal Civil Justice System*, the Australian Law Reform Commission did not support the introduction of fees based on a percentage of the outcome.[75]

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[67] Geoff Hoon, MP, Parliamentary Secretary at the Lord Chancellor's Department, "Conditional Fees", Speech to the Policy Studies Institute on September 23, 1997, at http://www.open.gov.uk/lcd/speeches/1997/conditnl.htm

[68] *Access to Justice Act, 1999*, ss. 27-31.

[69] Lord Chancellor's Department, *Access to Justice with Conditional Fees: A Lord Chancellor's Department Consultation Paper* (March 1998) at 3, at http://www.open.gov.uk/lcd/consult/leg-aid/lacon.htm

[70] *Access to Justice Act, 1999*, ss. 27 and 29.

[71] *Ibid.* ss. 28 and 30.

[72] *Legal Profession Act 1987*, (NSW), s.187(2), (3) and (4); and the *Legal Practice Act 1996,* (Vic), s.98.

[73] Barristers' Rules, r. 102A(d).

[74] Rules of Practice 1994 (Tas), r.92(1).

[75] Australian Law Reform Commission, *Discussion Paper 62: Review of the Federal Civil Justice System*, at 12, at http://www.austlii.edu.au/au/other/alrc/publications/dp/62/ch2.html

II. CONTINGENCY FEES IN PRINCIPLE: ARGUMENTS FOR AND AGAINST

The advantages and disadvantages of contingency fees have been debated often. The major arguments in support of and in opposition to the introduction of contingency fees are summarized below, followed by a more detailed analysis.

Pros:

(1) Removes financial barriers to clients with meritorious claims
(2) Minor impact on the justice system
(3) Impact on legal aid
(4) Widespread acceptance
(5) Consistent Canadian and international justice system
(6) Increased consumer choice and protection
(7) Public interest and good government

Cons:

(1) Clients end up worse off and lawyers end up with a windfall
(2) "Stirring up" litigation
(3) Volume of trials
(4) Inflated damage awards
(5) Unethical practices
(6) Solicitation by lawyers
(7) Conflict of interest
(8) Clients must be properly informed about their liability for costs

1. Arguments in Favour of Introducing Contingency Fees (Pros)

(1) Removes Financial Barriers to Clients With Meritorious Claims

The *First Report* of the Civil Justice Review expressed concern about the ability of the middle class to access the justice system.

> It is important to ensure that access to justice applies fairly to all members of society. There is a particular concern that the middle class, who do not qualify for Legal Aid, cannot afford the costs of litigation and therefore encounter a barrier to access to justice. As well, wealthier members of society can wear down middle class members since the latter cannot afford to fund lengthier lawsuits.[76]

Generally, legal services can only be purchased with an initial retainer to the lawyer and a commitment to pay an hourly rate for legal services and disbursements. Hourly billing is risky for clients because the final bill is generally unpredictable, making it difficult for clients to make economically rational decisions to litigate.[77] "The cost of hiring a lawyer is commonly perceived as

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[76] *First Report*, *supra* note 25 at 390.
[77] K. Roach, "Fundamental Reforms to Civil Litigation" in *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (Vol. 2, Ontario Law Reform Commission, 1996) at 395.

the single biggest obstacle to litigation in the Ontario Court (General Division)."[78] The following example illustrates the risks and costs associated with hourly billing.

> A client went to a large Toronto law firm to resolve a property and child support dispute with her ex-husband and apparently entered into a retainer on the basis that it would cost between $8000 and $24,000 to resolve the matter.... Two years later, the client received a legal bill totalling $63,015. The lead lawyer in the case billed 188.6 hours at $245 an hour while eight other lawyers worked on the case at similar rates. In addition, the services of eight law students, five law clerks and five legal secretaries were also billed to the client. An assessment was taken which reduced the legal bill by $27,000 from $63,000 to $36,000. This assessment was upheld on judicial review before a judge of the Ontario Court (General Division).[79]

While this example may seem atypical, according to the *First Report* of the Civil Justice Review, the cost of the average three-day trial to all litigants is $38,000, based on a lawyer's time being billed at $200 an hour.[80] Moreover, in an unreported decision of the Supreme Court of Canada in *Coronation Insurance Company Limited et al.* v. *Florence et al.*, Mr. Justice Cory stated:

> For many years it has been rightly observed that only the very rich and those who qualify for legal aid can afford to go to court. This point was brought home with shocking clarity by Mr. Justice George Adams in his paper presented the week of July 11th at the Cornell Lectures. There he noted that the total legal bills to all parties in an average General Division lawsuit (including those that settle before trial) may easily amount to between $40,000 and $50,000. Truly, litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced.[81]

Hourly billing has been widely recognized as a contributing factor to the delay and cost of litigation. In 1986, the Honourable Thomas George Zuber was appointed to inquire into and to report on the jurisdiction, structure, organization, sittings, case scheduling and workload of all of the courts of Ontario, and any other matter affecting the accessibility of and the service to the public provided by the courts of Ontario, and to make recommendations to the Attorney General concerning the provision of a simpler, more convenient, more expeditious and less costly system of courts for the benefit of the people of Ontario. In his 1987 report, Zuber recommended that the *Solicitors Act* and various rules of courts be amended to provide that the value of the work done, not the hours spent, be the paramount consideration when assessing a lawyer's bill or costs between the parties. Zuber concluded:

> Compounding the expense picture is a system of awarding costs at the end of a case which rewards inefficiency and prolixity by basing the assessment of costs on the number of motions, days at trial and hours spent on preparation.[82]

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[78] *Ibid.*
[79] *Ibid.*
[80] *First Report*, *supra* note 25 at 144.
[81] Aug. 8, 1984, S.C.C., at 4-5.
[82] Roach, *supra* note 778 at 396; see also Hon. T.G. Zuber, *The Report of the Ontario Courts Inquiry* (1987) at 52 and 217-8.

The Report of the Justice Reform Committee in British Columbia also found hourly billing problematic:

> If the amount of time spent on a case is multiplied automatically by the hourly rate, without regard to any other factors, the result will often be unfair. A client will pay more for the same work done by an inefficient lawyer than by an efficient one. Responsible lawyers who charge on the basis of an hourly rate do adjust their hours to take into account time that was spent unproductively and also their client's means and other relevant factors.[83]

Hourly billing presents a real risk of "overlawyering" because it gives lawyers incentives to prolong cases by, among other things, conducting more interlocutory motions and extending discovery.[84]

One way to make justice more accessible is to provide a flexible approach to the payment of legal services by permitting contingency fees. Contingency fees are advantageous for middle class litigants because they shift most of the risk of litigation from a client to a lawyer. Under a contingency fee agreement, the lawyer finances the litigation for the client while a case is pending. As a result, middle class clients, who are generally risk averse, do not have to commit to pay an unpredictable amount for their lawyer's services and are then able to turn to the justice system to seek redress for their injuries.

One of the purposes of the justice system is to afford compensation to an innocent victim who suffers losses as a result of the wrongdoing of another. If innocent victims cannot access the courts because of the high cost of legal services, then the costs of the damage generally fall on the public purse instead of on the wrongdoer. For example, if a person is injured by the actions of another and cannot afford to hire a lawyer, he or she may turn to the public purse for disability support payments, for employment insurance or welfare. Rather than the wrongdoer providing compensation for the damages caused, society pays. If innocent victims were able to access the courts, then the wrongdoer would bear the cost of the harm done.

The following real-life examples illustrate how contingency fees improve access to justice for middle class litigants and small to medium-sized business litigants.

1. A minority shareholder enters into business with a majority shareholder, who is a multimillionaire, and they develop a profitable business. The majority shareholder decides to cut the minority shareholder out of the business, stops his salary and alleges that he has acted improperly both in his capacity as a shareholder and as an employee. The minority shareholder only has his life savings for retirement and does not want to dip into those. The value of his share in the corporation is approximately $500,000.00.

   The minority shareholder would be happy to have a lawyer pursue the case on a contingency fee because he does not want to risk his retirement savings to pay the legal fees and expenses. It is the type of case where a lawyer would have to invest a lot of time and effort, experts may be needed, and it would be a hard fought battle with an opponent who can fund a very thorough defence. From a practical point of view, the client is

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[83] Roach, *ibid.* at 398; see also British Columbia, *Access to Justice: The Report of the Justice Reform Committee* (1988) at 156 [hereinafter *B.C. Report*].
[84] Roach, *ibid.*

inclined to simply drop the case if he has to pay what could be in excess of $100,000.00 in legal fees himself and, in that case, his ability to obtain a just adjudication of his rights is defeated by being up against a wealthy opponent.

2. The sole owner and operator of a successful dry walling and framing company was injured in an accident on an all terrain vehicle which flipped backwards and struck him full force in the face, crushing the bones and nerves of his face. He had previously entered into a contract with a disability insurer which called for him to be paid in excess of $4000.00 per month in the event of total disability. He made an early attempt to return to work but was unable to keep the business going.

   His caregiver provided a report to the company which indicated that he was able to return to work. As a result, the insurance company which had been paying benefits terminated the benefits. His agent contacted the insurance company to explain that the termination was unjustifed since the doctor in question was only examining the plaintiff's tear duct. A clarification was obtained from the doctor which indicated that the report was only meant to deal with the tear duct problem and in no way implied that from the perspective of the patient's other problems was the doctor of the opinion that he could return to work.

   As the months progressed, his condition deteriorated and eventually he cashed in his R.R.S.P.'s, lost the equity in his business and eventually his business went bankrupt. He sought the assistance of a lawyer but was unable to pay any legal fees. The lawyer agreed to take the case on the basis that fees would be payable at the end of the day with the law firm carrying all of the expenses. The lawyer commenced a claim in contract against the company which continued to refuse to reinstate benefits. The matter did not settle until more than 1 week of trial was completed at a settlement of an all-inclusive payment of approximately $700,000.00. Legal fees were $240,000.00 (which did not cover the time in the file). Disbursements were approximately $75,000.00.

3. Two people buy a lottery ticket, the holder of the ticket cashes it in for $500,000.00 and refuses to share the money with the co-purchaser. The other purchaser has nothing in writing, but simply a history in sharing the cost of buying tickets. The case could go either way depending on credibility at trial and the claimant to a half share in the lottery ticket cannot afford (if he could he would not have been buying lottery tickets) to hire a lawyer to fight the matter whereas the holder now has the funds to fight against his alleged partner.

4. A child is injured on the street and it is alleged that the child ran out between parked cars, giving the driver of the vehicle that struck him no chance to avoid hitting him. The child has severe brain damage and cannot remember the incident. The child's parents do not have the ability to fund the expensive process of investigating what happened and obtaining the medical reports necessary to detail the child's future expectations, such as attendant care 24 hours a day. In this case, a contingent arrangement allowed the lawyer the premium that permitted the lawyer to invest the time and the money in investigating how the accident happened and obtaining medical reports to pursue the case, which resulted in discrediting witnesses as to the child running into the street.

5. A quadriplegic is seeking accident benefits from an insurance company and the insurance company is denying every claim. The quadriplegic and his family have no way to afford to pay a lawyer to fight with the insurance company and have no other funding source for the fight. The quadriplegic is seeking to have his accident benefits quantified as a lump sum and paid to him to administer and look after himself. The insurance company refuses. An hourly rated lawyer would be reluctant to take on this case unless it was on some sort of contingent arrangement and certainly a contingent fee would usually be negotiated under the table. In this case the net result was that the quadriplegic, through aggressive pursuit of benefits and claims against the insurance company, was able to eventually obtain a fair quantification of his benefit entitlement of 1.7 million dollars when the insurance company had initially been offering less than $500,000.00.

6. A construction contractor doing a job is asked to perform numerous extras by the general contractor but does not get detailed specifications and authorizations in writing prior to embarking on these extra tasks, as is often the case in the construction industry. When the project is complete, the contractor submits a claim for extras for in excess of $1,000,000.00 and the general contractor denies ever having authorized them and states that they were not needed or were simply repair work for improper workmanship on the part of the contractor.

   The contractor has no ability to fund the very expensive and involved proceedings necessary to accommodate a review of the entire contract, engineer's reports, architect reports and building committee reports, and to pursue this claim which resulted in a trial in excess of 50 days. The end result was the contractor's claim was allowed and the contractor was found to be entitled to most of the extras claimed. Without a contingent fee arrangement on an ad hoc/under the table basis, the contractor would have had to give up the claim, and again a fair and just result would not have occurred because the general contractor had the means and ability to dispute the claim and dispute the matter through the Courts even though the claims were just.

7. An individual is suffering property damage from pollution due to a factory upstream. The factory denies it is causing the pollution or that the pollution is damaging the individual's property. The individual does not have the money to hire experts or to pursue the claim, but a lawyer with a premium through a contingency fee would be prepared to pursue the matter if it appeared that there was a reasonable chance of success.

8. G was a 13 year-old grade "A" student in grade 8. His working class parents owned a modest home and although both worked and they were able to pay their regular bills, there was no money available for "extras".

   G was riding his bicycle with a friend when he was struck by a speeding car and sustained a serious head injury. Although G eventually attended high school, he had numerous cognitive deficits and displayed a profound and often violent personality change. He required counselling, private tutors and teaching assistants at the school and his mother had to stop working for significant periods of time in order to provide care to G and to deal with the various problems that were consequent upon his injury.

G's parents did not know how they would be able to handle all of the expenses and were of the view that despite the fact that the driver of the car which struck G was travelling at a high rate of speed, G would have no claim because he had proceeded through a stop sign. They consulted with a personal injury lawyer at the firm of a family friend who advised that the defendant driver could be found to be partially responsible for G's injuries if indeed he was travelling at an excessive rate of speed. The lawyer was retained on a "fee on completion" basis. It was agreed that the firm would carry the expenses on the file and would not render an account until the conclusion of the matter. The fee was to be based on a variety of factors, including time expended, risk and result obtained.

The law firm retained experts in the reconstruction of accidents and obtained a report which indicated that the defendant driver was travelling in excess of 80 km per hour in a 50 km zone. The firm also retained numerous medical experts and eventually the case was settled for approximately $800,000.00 plus costs. Legal fees in the matter were approximately $250,000.00 and disbursements were approximately $50,000.00.

(2) Minor Impact on the Justice System

It is difficult to quantify the potential impact of contingency fees on Ontario's civil caseload because before" and "after" statistics are not available. Only Alberta has been able to provide us with civil caseload statistics soon after contingency fees were permitted in the province (1967), but they do not have the statistics for the years prior to the introduction of contingency fees. Given that no "before" and "after" statistics are available, it is unclear what, if any, meaningful conclusions can be drawn from a comparison of Ontario's and Alberta's statistics.

Year	Alberta Number of Civil Cases Commenced	Ontario Number of Civil Cases Commenced
1965/66	Not available	8,489*
1968/69	35,130	10,604*
1974/75	43,333	Not available
1984/85	84,579	72,018
1998/99	52,138	65,880

* This figure only includes the number of cases in Superior Court – the District Court statistics are not available. In 1968/69, 12,783 cases were commenced in Alberta's Superior Court.

We have asked every province if they have conducted a study of the impact of contingency fees on their civil caseload but no province has done so. The Law Society of Manitoba conducted a cursory review of contingency fees, based largely on comments received from 15 lawyers in the province.[85] In its Report, the Special Committee made only one remark with respect to the impact of contingency fees on the volume of litigation: "Your Committee does not concur in the view of the one member of the Committee who feels that contingency agreements increase litigation unnecessarily."[86] Overall, the Committee concluded that there was a need for contingency agreements in Manitoba so that middle class citizens and people with insufficient funds could have

[85] *Report to the Law Society of Manitoba on Special Committee on Contingency Arrangements* (1975).
[86] *Ibid.* at 4.

the choice of whether or not to have a case handled on a contingency fee basis.[87] The Committee also felt that the public supports contingency fees because they believe that a lawyer will work harder where there is an inducement based on the result.[88]

Anecdotal evidence from other provinces suggests that contingency fees have not had a dramatic impact on civil caseloads. In "Fee Shifting", Herbert M. Kritzer noted that "Nova Scotia only recently (in the mid-1970's) adopted rules permitting contingency fees ... [and] conversations I had with barristers in Halifax do not suggest that this change has resulted in a sudden increase in cases."[89] He also noted that "none of my respondents, many of whom are executives in corporations with major operations in provinces where contingent fees are permitted, made any mention of a greater litigiousness among the residents of the areas with contingent fees."[90]

We have collected current statistics regarding the number of civil cases commenced to compare the numbers in Ontario with other provinces. Based on this information, the number of civil cases commenced for every 1000 persons is as follows: Alberta – 18, Quebec – 13.8, British Columbia – 11.1, Saskatchewan – 4.5, Manitoba – 5.9, Ontario 5.8, Nova Scotia – 8.9, and the Yukon – 1.8. Even with contingency fees, a few provinces have lower litigation rates than Ontario. It should also be noted that Ontario's civil caseload has declined significantly over the last several years and, as a result, the system has capacity to handle an increase in the number of cases.

Province	Year	Number of Civil Cases Commenced	Number of Contingency Fee Agreements Filed	Population (thousands)	No. of practising lawyers
British Columbia	1998/99	44,532*	N/A	4,000	8,459
Alberta**	1998/99	52,138*	13,993	2,900	6,407
Sask.	1997	4,498	N/A	1,000	1,456
Manitoba	1998	6,448*	N/A	1,100	1,699
Ontario	1998/99	65,880*	N/A	11,400	24,274
Quebec	1999	100,399*	N/A	7,300	14,825
New Brunswick	1998/99	5,326*	N/A	0,750	1,199
Nova Scotia	1998/99	8,328*	N/A	0,940	1,599
PEI	1998	223***	16	0,140	196
Nfld				0,550	569
NWT				0,040	292
Yukon	1998/99	526*	N/A	0,030	209

* Excludes Small Claims Court cases, probate cases, and petitions for divorce
** Alberta does not have no-fault automobile insurance
***Number of statements of defence filed

The only other information available that may be used to estimate the potential increase in the number of civil cases is legal aid funding data. The total number of "other civil" (excludes family

[87] *Ibid.* at 1.
[88] *Ibid.* at 4.
[89] "Fee Shifting", *supra* note 54 at 132.
[90] *Ibid.* at 130.

law cases) legal aid certificates issued has fallen from 20,181[91] in 1994/95 to 5,684[92] in 1998/99 due to funding cuts. Assuming the number of applications remained constant, this would mean that approximately 15,000 civil cases were not commenced as a result of the budget cuts. If you assume that all of those cases would go forward if contingency fees were permitted in Ontario, then there would be a 22.8% increase in Ontario's civil caseload (from 65,880 cases to 80,880 cases - this gives a rate of 7.1).

Another issue to consider is the impact of contingency fees on the number of motions and trials. Again, conclusive empirical evidence is not available. But, it is arguable that counsel are unlikely to initiate more motions or take more cases to trial in contingency fee cases because it would generally be in their best interests to resolve cases as quickly and efficiently as possible in order to recover their fees.

(3) Impact on Legal Aid

In 1994 the Government capped its funding to legal aid, as the Legal Aid Plan (the "Plan") was facing a fiscal crisis of major proportions ($67 million debt). To meet its budget and to remain on target to repay its debt, the Plan implemented a series of measures in the Fall of 1995 and in April 1996 which reduced the number of certificates issued, and imposed restrictions on the legal aid tariff. As a result of these measures the number of certificates issued was cut by more than half and coverage was restricted to the most serious matters.[93]

By 1998 the Plan had paid off its debt and was in a position to redress some of the damage caused by the cutbacks and increase its services. [94] In fiscal 1997/98, the number of certificates issued began to steadily increase. Nevertheless, certificates have not returned to the levels which existed prior to the 1995/96 cutbacks.

In 1994/95, for example, 20,181 "other civil" certificates were issued, whereas in 1996/97 this number had dropped to 3,711. [95] "Other civil" certificates include workers compensation, mental health, personal injury, damage actions and landlord and tenant cases. The number of "other civil" certificates issued by legal aid decreased over 80% from 1994/95 to 1996/97 and over 60% from 1995/96 to 1997/98.[96]

Contingency fees could fill the gap left by legal aid funding cuts by providing access to private funding for civil cases for which legal aid is no longer available, such as wrongful dismissal, personal injury, consumer and commercial litigation, debt collection, real estate and estates matters. This would allow individuals who can no longer obtain legal aid for certain civil cases but who do not earn a sufficient income to finance litigation to have access to the courts.

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[91] Ontario Legal Aid Plan 1997/98 Annual Report at 6.
[92] Information provided by Legal Aid Ontario.
[93] See the McCamus Report, *Legal Aid Review*, Vol. 1 and the Ontario Legal Aid Plan 1997/98 Annual Report.
[94] Information provided by Legal Aid Ontario.
[95] See the 1994/95 and the 1997/98 Ontario Legal Aid Plan Annual Reports.
[96] *Ibid.*

(4) Widespread Acceptance

Nearly all of the other provinces have had contingency fees in place for over 30 years. None of the provinces is considering prohibiting the use of contingency fees. This shows that contingency fees have passed the pragmatic test of workability and acceptance throughout Canada.

Province	Year Contingency Fees Permitted[97]
British Columbia	1969
Alberta	1967
Saskatchewan	1975
Manitoba	1890
Quebec	1941*
New Brunswick	1973
Prince Edward Island	1977
Nova Scotia	1972
Newfoundland	1986
Northwest Territories	1979
Yukon	1980

*Contingency fees were permitted in collections matters by regulation. Note, however, that contingent fee agreements are now subject to the Code of Ethics of Advocates, which simply states that a lawyer has to charge a reasonable fee.

(5) Consistent Canadian and International Justice System

Because Ontario's legislation is out of step with the rest of the country, Ontarians do not have access to legal representation on the same basis as all other Canadians. A middle-class person living in Ontario does not have the same opportunity to advance a claim on a contingency fee basis as a person living in Alberta, for example.

It is interesting to note that while average Ontarians may be precluded from commencing a claim because of the prohibition against contingency fees, the federal and provincial governments are not so constrained. The federal government recently commenced a suit against R.J. Reynolds in Syracuse, New York, on a contingency fee basis, for damages suffered as a result of alleged cigarette smuggling through the Akwesasne reserve.[98] The Ontario government has also commenced two tobacco litigation suits in the United States on a contingency fee basis. "Average Canadians, who cannot afford to hire a lawyer, can only watch with amusement as our governments, both Ontario and the feds, skirt the Ontario prohibition against contingency fees by hiring foreign lawyers."[99]

Ontario's own legislation is inconsistent and confusing for the public because contingency fees are permitted in class action proceedings but not in any other litigious matters. A person who commences an individual claim does not have the same access to justice as a person who forms part of a class advancing an action.

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[97] Canadian Bar Association – Ontario, *Report on Contingency Fees* (June 10, 1988) at 32-3.
[98] D. Lennox, "Suing Big Tobacco and the plaintiff bar in Canada: Pt. 2" in the *Law Times* (January 17, 2000) at 5.
[99] *Ibid.*

(6) Increased Consumer Choice and Protection

A regulated contingency fee system would protect consumers and create a level playing field between lawyers and their clients and amongst legal consumers. Consumers would be protected by the rules governing the form of a contingency fee contract, such as requirements that the contract be in writing, that it state the method of calculating the lawyer's fee, that it set out who is responsible for paying fees and disbursements and that the client was given the option of an hourly fee. In a regulated contingency fee environment, consumers would be well informed and would have more power in their dealings with lawyers. Contingency fees may lead to more competitive pricing because consumers would have a written agreement that they can use to shop around for the best fee arrangement. However, contingency fees do not guarantee that a lawyer would accept every case on a contingent basis, particularly high-risk cases.

In addition, a regulated contingency fee system would level the playing field amongst legal consumers so that both highly sophisticated and less sophisticated consumers have the opportunity to advance a claim on a contingent basis.

(7) Public Interest and Good Government

According to the Cumming Report, 21.7% of lawyer respondents in Ontario indicated that they typically use a payment by the hour scheme together with a bonus based on successful results. Moreover, 8% of the respondents indicated that they accept a lump sum fee agreed upon at the outset or conclusion of the litigation.[100] Because these kinds of contingency fee arrangements are generally prohibited in Ontario (see discussion of the current law in Ontario in Part I), many lawyers enter into these kinds of agreements informally with their clients.

This is a concern because there is a significant power imbalance between many members of the public and lawyers. Generally, members of the public find lawyers and the law to be intimidating and may not question the fee arrangements their lawyers recommend. This power imbalance can lead to situations in which a lawyer tries to take advantage of his or her client by, for example, unilaterally increasing the percentage fee agreed to at the time of the retainer. From the perspective of "good government", the current situation of having legal consumers enter into "under the table", unregulated contingency fee agreements should not be encouraged.

2. Arguments Against Introducing Contingency Fees (Cons)

(1) Clients End Up Worse Off and Lawyers End Up With a Windfall

The question of whether clients are ultimately better off or worse off given the contingency fee as opposed to alternative mechanisms of paying for legal services is one of the most difficult ones to answer. In "The Wages of Risk: The Returns of Contingency Fee Legal Practice", Herbert M. Kritzer argued:

> Many contingency fee clients probably do pay more for legal services than they might if they paid by the hour. However, many of those same clients would probably never seek redress if it were not for the insurance function provided by the contingency fee. In a sense,

[100] *Cumming Report*, *supra* note 49 at 8.

> clients pay a premium for eased access to the civil justice system. Furthermore, many, perhaps most, clients are able to have access precisely because of the availability of a system like the contingency fee. In a fundamental sense, there is a trade-off between access and cost, where the access issue is a combination of risk shifting from the client to the attorney and the availability of funds up front to purchase a needed service.[101]

In his article, Kritzer also reported on the kinds of fees and incomes Wisconsin lawyers earned from contingency fee work. He found that in about half of the cases in his sample lawyers did better than the median hourly rate for hourly fee work and in the other half they did worse.[102] Based on the study, Kritzer concluded:

- The returns from contingency fee practice are at best "somewhat" better than what lawyers earn from hourly fee practices.
- Some, perhaps much, of the surplus disappears when one takes into account the time and effort contingency fee lawyers devote to screening cases.
- A small segment of cases produces substantial "profits", but few lawyers are able to tap into this segment of cases on a routine basis.[103]

In the Canadian context, statistics compiled by the Insurance Corporation of British Columbia ("ICBC") showed that in 86% of cases lawyers earn less, the same as or only slightly more in contingent fee agreements than they would on an hourly-fee basis. According to the 1988 Report of the Justice Reform Committee in British Columbia,

> ICBC reports that approximately 66% of claims against it are worth less than $25,000. Most lawyers agree that at that level their fees on a contingency contract are less than they would be if they had billed on an hourly rate. Another 20% of writs issued involve cases between $25,000 and $100,000. At that level of award, the lawyer's contingency fee is probably slightly higher than the hourly rate would be only if the case does not have to go to trial. It is only in the remaining 14% of cases, involving more than $100,000 where contingency fees can be considerably higher than an hourly rate bill would be.[104]

In order to alleviate concern that lawyers would charge excessive fees in contingency fee contracts, controls could be imposed on the fees charged. First, compensation could be supervised by judges through fee review mechanisms. This would permit a client to seek judicial review of a lawyer's compensation where the client believes that the amount paid to his or her lawyer is excessive or unreasonable. Second, maximum limits or "caps" on fees could be imposed to preclude lawyers from charging an excessive percentage of a settlement or judgment.

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[101] H.M. Kritzer, "The Wages of Risk: The Returns of Contingency Fee Legal Practice" (1998) DePaul L.R. [Vol.47] 267 at 307.
[102] *Ibid.* at 292-3.
[103] *Ibid.* at 302.
[104] *B.C. Report*, *supra* note 83 at 157.

(2) "Stirring Up" Litigation

It is argued that the prospect of contingency fees will cause lawyers to encourage clients to pursue all kinds of unmeritorious claims, resulting in an increase in the number of frivolous cases. This concern is based largely on reports of significant jury awards issued in the United States. There are primarily three reasons why this is less likely to occur in Ontario.

First, the Canadian "party and party" costs rule is an important deterrent to unmeritorious lawsuits.[105] This rule does not apply in the United States. "If one assumes that individuals tend to be risk averse, then a fear of having to pay the other sides' costs, even if one is not concerned about one's own costs, may be a substantial deterrent to litigation."[106]

Second, the court may order security for costs where "there is a good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent."[107] In addition, costs may be used as a sanction where a court finds that a lawyer for a party "has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default."[108] These two rules serve as deterrents to both lawyers and clients considering commencing an unmeritorious lawsuit or taking unnecessary steps during the course of litigation.

Third, it is unlikely that lawyers would accept cases of little merit when their fee is contingent upon success. It would be more likely for lawyers to bring frivolous cases forward with hourly fees because they would be paid regardless of the outcome of the case. In a study of contingency fee use in Wisconsin, Herbert M. Kritzer found that out of the 455 lawyers involved in the study, they accepted 16,519 of 53,584 cases that the public contacted them about, for an acceptance rate of 31%.[109] He concluded:

> This research makes it clear that contingency fee lawyers do operate as gatekeepers: *they turn away substantial numbers of potential clients, most often because those potential clients simply do not have a basis for pursuing the case.* The contingency fee structure means that lawyers carry out this function in large part as an exercise in economic self-interest. That is, lawyers try to choose cases they believe will yield fees at least equal to what they could earn from either hourly fee cases or from other contingency fee cases. In a sense, the lawyer is making decisions about which cases to include in his or her portfolio of risks. The lawyer knows that some cases will fail to yield a fee sufficient to compensate for expenses while other cases will yield a profit that will at least offset the "unsuccessful" cases, and hopefully yield a profit across the entire portfolio.[110]

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[105] *Supra* note 55.
[106] "Fee Shifting", *supra* note 54 at 132.
[107] Rule 56.01(e).
[108] *Supra* note 55.
[109] H.M. Kritzer, "Contingency Fee Lawyers as Gatekeepers in the Civil Justice System" (July-August 1997) Judicature [Vol. 81, No.1] 22 at 24.
[110] *Ibid.* at 29.

(3) Volume of Trials

There is little empirical data available to support or dismiss the argument that plaintiffs who bear no risk for legal fees will have less incentive to settle cases, thereby clogging the courts. Although a plaintiff may not bear the risk for paying his or her own legal fees, there are three other financial repercussions that may serve to dissuade plaintiffs from refusing to settle (some of these have already been discussed above).

> 1) A plaintiff may have to pay the other side's costs if the plaintiff's case is unsuccessful.[111] The financial repercussions of such a costs award would serve as a disincentive to a middle class plaintiff to take a case to trial.
>
> 2) The Rules of Civil Procedure set out additional cost sanctions where parties refuse reasonable settlement offers.[112] The cost sanctions can be quite severe because the party who refuses a reasonable settlement offer may be required to pay costs on a solicitor and client scale.
>
> 3) Some contingency fee agreements provide that the client must pay for disbursements and other expenses associated with the case (e.g. experts' reports, court costs, etc.). This can be a significant financial risk to the client and thus would also serve as a deterrent to taking a case to trial.

It can also be argued that lawyers have a greater incentive to settle cases with contingency fees than when they receive hourly fees. With hourly fees, they will be paid regardless of the outcome of the trial. Under a contingency arrangement, a settlement turns the possibility of a fee into a certainty.

> The [contingency fee] lawyer must obtain some recovery to obtain any fee, and the lawyer must balance the time and effort put into a case against the fee potential of the case..... [O]ften it is better, from an economic viewpoint, for a contingency fee lawyer to resolve a case through settlement than through trial, even if the trial might produce a larger overall payment.[113]

While contingency fee lawyers have an incentive to settle, they "...do not simply take the quick, cheap settlements that economic analyses suggest are to be expected, but try to insure that their clients go away satisfied and stay satisfied, as they inevitably discuss their experience with friends, family, neighbours and co-workers.'[114]

In the Cumming Report, the authors tested the factors that might lead to a conflict between a lawyer and his or her client over a settlement decision.[115] They found that the presence of an hourly fee rate seems to reduce conflict over settlement but that the presence of a contingency fee arrangement does not by itself create a conflict. An hourly rate plus bonus fee arrangement reduces the potential

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[111] *Supra* note 55.
[112] Rule 49.10.
[113] H.M. Kritzer, "Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship" (1998) Law and Social Inquiry (American Bar Association) 795 at 800.
[114] *Ibid.* at 799.
[115] *Cumming Report*, *supra* note 49 at 26.

of a settlement conflict. Lawyers with a higher percentage of their cases on contingency fee arrangements are more likely to have a dispute with their clients with respect to settlement.[116] They also found that there is weak evidence that lawyers who invest a greater amount in the disbursements of a case will be more inclined to disagree with a client with respect to the settlement decision. Finally, they found that the 33.3% cap in British Columbia seems to cause a divergence of interests in the settlement decision between lawyers and their clients.[117] While contingency fees may result in an increased risk of conflict between lawyers and clients over settlement decisions, there is insufficient evidence to conclude that they result in a significant increase in the number of trials.

(4) Inflated Damage Awards

It is argued that to adequately compensate successful plaintiffs, and because lawyers may inflate damage claims to increase their fee, courts may award excessively high damages, thus penalizing defendants and increasing insurance costs.

The courts may award damages under two main heads: (1) compensatory damages and (2) damages that are not based strictly on compensation.[118] Compensatory damages cover pecuniary and non-pecuniary losses. Pecuniary or economic loss includes loss of earnings, loss of profits, expenses of medical treatment and costs of repair or replacement.[119] Non-pecuniary or non-economic losses include pain and suffering, physical inconvenience and discomfort, and mental distress.[120]

Non-compensatory damages fall into two main categories: (1) nominal damages and (2) exemplary or punitive damages. Nominal damages is a technical phrase which means that there is an infraction of a legal right which, though it gives a plaintiff no right to any real damages at all, gives him/her a right to the verdict or judgment because his/her right has been infringed.[121] Exemplary or punitive damages are awarded for the purpose of punishing the defendant for his conduct in inflicting the harm.[122] Punitive damages come into play whenever the defendant's conduct is sufficiently outrageous to merit punishment.

Unlike the United States, where very large damages may be awarded for non-economic losses, in Canada these damages are limited by the Supreme Court of Canada to $269,000 in 1999 dollars.[123] The cap on damages for non-economic losses limits the costs borne by insurance companies. This, in turn, helps to control insurance costs for the government, businesses and consumers.

In addition, awards for punitive damages in Canada are generally modest. For example, awards for punitive damages against insurers based on bad faith handling of insurance claims are traditionally in the range of $7,500 to $15,000.[124] In a recent decision, the Ontario Court of Appeal discussed the assessment of awards for punitive damages:

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[116] *Ibid*, at 28
[117] *Ibid,* at 29.
[118] H. McGregor, *McGregor on Damages*, 16th ed. (London: Sweet & Maxwell, 1997).
[119] *Ibid.* at 25.
[120] *Ibid.* at 49.
[121] *Ibid.* at 281.
[122] *Ibid.* at 287.
[123] *Supra* note 56.
[124] *Whiten* v. *Pilot Insurance Co.* (1999), 42 O.R. (3d) 641 (C.A.), [1999] O.J. No. 237 (QL) at 2 and 11 [hereinafter *Whiten* cited to QL]. Application for leave to appeal to the Supreme Court of Canada was granted October 14, 1999. Hearing date not yet set, [1999] S.C.C.A. No. 157.

> While punitive damages ... may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, the fact finder must be guided by more than the defendant's net worth ... *plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.*[125]

By contrast, a 1996 survey of the 75 largest counties in the United States found that the median punitive damage amount awarded to a plaintiff was $40,000.[126] Twenty-one percent of punitive damage awards were over $250,000 and 7% were $1 million or more.[127] The median amount awarded to plaintiff winners for punitive damages in jury trial cases was $50,000.[128] In cases presided over by judges, the median amount awarded to plaintiff winners for punitive damages was $38,000.[129]

While there is no cap on punitive damages in Canada, the practice of granting modest awards under this head of damages is unlikely to change simply as a result of the introduction of contingency fees. The Ontario Court of Appeal has made it clear that plaintiffs will not be granted a windfall for punitive damages simply because the defendant has a deep pocket.[130]

In the Cumming Report, , the authors found that only 1% of respondents amongst lawyers in British Columbia thought that contingency fees were more likely to result in punitive damage awards than non-contingency fee cases.[131] Another 56% of respondents thought that there was no relation between punitive damages and contingency fees and 43% had no opinion on the issue.[132]

(5) Unethical Practices

It is argued that by allowing lawyers to acquire a personal interest in the outcome of the case, they may be tempted to engage in a variety of unethical litigation practices in order to win, such as improper coaching of witnesses, "building a case" by constructing evidence, using demonstrative evidence to elicit the emotions and sympathies of the jury, improper examination and cross-examination, and padding damage claims.

The risk of unethical behaviour exists whatever the fee arrangement. In order to protect consumers, the LSUC and the courts have the authority to intervene to provide remedies and penalties for unprofessional behaviour. These can be applied to lawyers whether they receive an hourly rate or a contingency fee.

In addition, cost sanctions are available where there has been litigation misconduct. Indeed, costs may be used against lawyers personally where appropriate.

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[125] *Ibid.* at 17 (Finlayson J.A. citing from *Pacific Life Insurance Co.* v. *Haslip*, 499 U.S. 1 at 22 (1990)).
[126] "Civil Verdicts", *supra* note 60 at 9.
[127] *Ibid.*
[128] *Ibid.* at 10.
[129] *Ibid.*
[130] *Whiten, supra* note 124.
[131] *Cumming Report, supra* note 49 at 39.
[132] *Ibid.*

It can also be argued that contingency fees will reduce unethical practices because clients will be able to enter into a written contingency fee contract, which they cannot do now, and will have the power to enforce the terms of the contract in court. A consumer who disputes the fee arrangement will be able to seek a review by a judge. Regulations governing contingency fee contracts could also require that consumers be given detailed, written information about their rights and obligations before they may enter into a contingency fee arrangement. This will reduce the risk of unethical practices by lawyers charging a contingency fee.

(6) Solicitation by Lawyers

It is alleged that lawyers may actively solicit cases to obtain a percentage of recovery, which undermines their credibility in the eyes of the public and before the court.

There is no empirical evidence available to support or deny this allegation. But it is arguable that there is a greater incentive to solicit clients under the present system, where payment is based on an hourly fee, because the lawyer will be paid regardless of the outcome of the action.

Lawyers are also unlikely to actively solicit cases if contingency fees are permitted because they may offend the rule against maintenance. Maintenance occurs where a person supports litigation in which he or she has no legitimate concern without lawful justification.[133] The common law rule against maintenance makes it a civil wrong for lawyers, among others, to promote unnecessary litigation.

(7) Conflict of Interest

A lawyer's desire to obtain the maximum fee possible may conflict with the interest of the client in obtaining the largest possible net recovery. For example, lawyers may not be objective in advising clients in the decision to settle, which will affect the lawyer's remuneration.

While this is a potential danger, it is important to note that over 95% of all cases do not go to trial because it is almost always in the best interests of lawyers and their clients to resolve cases early on. The potential for conflict exists under the current system, where settlements include both an amount payable to the client as compensation, as well as an amount payable to the lawyer as costs. This carries just as much danger of a conflict in that the lawyer may be influenced by a personal interest in the costs.

In the Cumming Report, the authors tested what may lead a lawyer into a conflict of interest with the client and what regulations may minimize the existence of this moral hazard problem.[134] They found that the presence of a contingency fee does not by itself lead to a moral hazard problem.[135] According to their analysis, an hourly rate plus bonus fee arrangement reduces the potential for conflicts of interest.[136] There is weak evidence that lawyers who invest a greater amount in the disbursements of a case will be more inclined to disagree with a client with respect to the settlement

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[133] *Black's Law Dictionary*, 5th ed. (1979) at 859.
[134] *Cumming Report*, *supra* note 49 at 24-30.
[135] *Ibid.* at 28.
[136] *Ibid.*

decision.[137] They found that a percentage cap of 33.3% in British Columbia seems to cause a divergence of interests in the settlement decision between lawyers and their clients.[138] The prohibition on cost recoveries by lawyers and the review process for fee disputes have no statistically significant effect on the moral hazard problem in settlement.[139]

(8) Clients Must be Properly Informed About Their Liability for Costs

Contingency fee arrangements do not cover costs of an unsuccessful action, in which case clients -- not their lawyers -- bear the risk of potentially high costs, disbursements and other expenses of the lawsuit. Consumers may be misled to believe they bear no risk. However, with appropriate disclosure requirements, clients can be properly informed about the risks of personal liability for costs. For example, the government could require contingency fee contracts to set out a client's rights and to explain their potential financial obligations. This would ensure that clients are advised of their potential financial liabilities before entering into a contingency fee arrangement.

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[137] *Ibid.*
[138] *Ibid.* at 29.
[139] *Ibid.*

III. IMPLEMENTATION OF CONTINGENCY FEES - PROPOSED CONTROLS AND SAFEGUARDS

A variety of controls and safeguards can be imposed to regulate contingency fees to protect consumers, avoid abuse and prevent over-charging by lawyers, including: restrictions on the area of practice to which contingency fees can be applied, restrictions on clients, regulation of the lawyer's remuneration, review of the contingency fee contract, filing the contract with the court and regulating the form and content of the contract. These are discussed in detail below. A summary of the recommendations is set out at the end of this section of the paper.

1. Prohibited Areas of Practice

While many Canadian jurisdictions do not restrict the use of contingency fees to any area of practice (Manitoba, Nova Scotia, Prince Edward Island, Newfoundland, Quebec and the Northwest Territories), others explicitly prohibit their use in criminal and family cases, for public policy reasons.

(1) Criminal and Quasi-Criminal Cases

Background

Alberta and New Brunswick, and the LSUC and CBAO proposals, exclude criminal law. No other province explicitly excludes criminal proceedings.

There are two reasons generally given for excluding criminal matters. One is to avoid the danger of corrupting justice by creating a financial incentive to win. The second is that criminal cases do not involve a monetary claim from which a fee might be derived. Even where not prohibited, lawyers would not likely take criminal cases on a contingency fee basis because of the absence of "damages". Further, legal aid is generally available to low income accused.

Issue: Should Ontario prohibit contingency fees in criminal and quasi-criminal law matters?

Pros:
- prohibition removes financial incentive to win criminal cases
- contingency fees in criminal matters might be seen by the public as unethical; an explicit prohibition reassures the public that they will not be used
- legal aid is generally available to low income accused persons in many criminal matters
- prohibition is consistent with LSUC and CBAO proposals

Cons:
- even without prohibition, lawyers are unlikely to take criminal cases on a contingency fee basis
- prohibition is inconsistent with the approach taken by most other provinces

Recommendation: Ontario should prohibit contingency fees in criminal and quasi-criminal law matters.

(2) Family Law Cases

Background

Family law proceedings include divorce, custody and access, support, enforcement, division of family property, and child protection. Contingency fees are inappropriate in divorce, custody and access proceedings, as there is no monetary award from which a fee could be derived.

Contingency fees are not likely to enhance access to legal representation for clients in support and family property disputes. Clients of significant financial means can afford to pay a lawyer's hourly rate. For low income clients, legal aid is available for a range of family law matters, such as:

- to obtain custody or access
- to set up, increase or decrease child or spousal support payments
- to stop one's partner from selling or destroying one's property
- to negotiate ownership of things like RRSPs or pensions that could provide a claimant with some income

Legal Aid Ontario also provides duty counsel at courts to deal with the immediate needs of litigants until they can hire a lawyer.

The Ministry of the Attorney General provides a range of family law services for the public. The Ministry provides a regime for the collection of support payments, which reduces the need for private parties to have to initiate proceedings of their own. The Family Responsibility Office ("FRO") works under the authority of the *Family Responsibility and Support Arrears Enforcement Act,* which took effect in 1997. The law mandates FRO to enforce court-ordered child and family support, domestic contracts and paternity agreements filed with the Office. FRO collects court-ordered support payments either directly from the payer, the payer's income source(s), or through enforcement actions.

The Ministry funds mediation services which operate in connection with all Family Court locations. Mediation is available for issues arising on family breakdown including custody, access, support and property division. The mediation service is also responsible for administering regular information sessions for parents on the effect of separation and divorce.

The Ministry also funds a Family Law Information Centre at every Family Court site, which provides clients with a range of information and referral services as well as short term legal assistance. These Centres will be expanded to certain non-Unified Family Courts this year.

New Family Law Rules have been established to help families resolve their legal problems more quickly, at less cost, and with less conflict. The process emphasizes early dispute resolution, and discourages litigation as the primary mechanism for resolving cases.

The exclusion of family law from contingency fee arrangements is based on the concern that contingency fees may give lawyers an inappropriate share of often scarce family resources. This would have a negative impact on children in particular, by reducing the amount of money available to maintain children at acceptable levels.

It is also based on the concern that contingency fees would inhibit the reconciliation of estranged spouses by fuelling litigation between them. This would be in direct opposition to the current trend in family law, the early resolution of family law matters, and would be opposed to the guiding principles of the new Family Rules and the expansion of the Unified Family Court system in Ontario.

Both the LSUC and CBAO proposals would prohibit family law proceedings from contingency fee arrangements. Alberta permits contingency fees in property and support disputes. British Columbia, New Brunswick and Saskatchewan also permit contingency fees in these matters, with court approval. No other province explicitly excludes family law matters.

Issue: Should Ontario prohibit contingency fees in family law matters?

Pros:

- provides maximum assurance that contingency fees will not be used inappropriately
- eliminates risk that lawyers will receive a share of scarce family resources and that vulnerable clients may be exploited
- contingency fees would do little to enhance access to legal representation for family clients
- contingency fees in family matters might be seen by the public as unethical
- consistent with LSUC and CBAO proposals

Con:

- most provinces do not exclude family law matters

Recommendation: Ontario should prohibit contingency fees in family law matters.

2. Prohibited Clients

Background

While most provinces do not restrict the type of client who may enter into a contingency arrangement, the Yukon prohibits contingency arrangements with minors or persons under legal disability and New Brunswick requires court approval for such clients.

Neither the LSUC nor the CBAO would prohibit minors or persons under legal disability because they are represented by litigation guardians, and there are sufficient safeguards in the existing civil procedure rules to address this situation. Most important is the rule requiring a court review of any settlement made by a litigation guardian, including the lawyers' fee. This rule would remain intact under a contingency fee system

Issue: Should Ontario prohibit contingency fee contracts with minors and persons under legal disability?

Pros:

- none

Cons:

- unnecessary restriction, as sufficient protection is in place with existing rules
- reduces access to legal representation for these clients without adequate justification
- inconsistent with LSUC and CBAO proposals

Recommendation: Ontario should not prohibit contingency fee contracts with minors and persons under legal disability.

3. Limits on Lawyer's Remuneration

(a) Costs

Issue: Whether a contingency fee may include both costs and a percentage of the amount recovered?

Background

In determining a fair fee, it is necessary to be aware that in addition to the amount recovered by the client as damages is an amount awarded by the court or incorporated into a settlement for "costs".

Courts usually award the winning side "party and party costs," which are intended to indemnify the client for expenses incurred to pursue the lawsuit. These expenses would include court filing fees, medical and other expert reports, the lawyer's fees, and other disbursements. In a proceeding such as a lengthy personal injury case, these expenses can be substantial. The amount of costs awarded by the court is determined by a tariff contained in the civil procedure rules. In general, party and party costs will cover about half the actual cost of carrying a case.

Costs at a higher level (known as "solicitor and client costs") may be awarded in certain circumstances, for example as a sanction against a party for unnecessarily prolonging the proceedings, refusing to accept a reasonable settlement offer or behaving improperly during litigation.

In some cases, court awarded costs may be higher than a plaintiff's recovery, or higher than the fee that is being charged by the lawyer. In such cases, a percentage of the award alone would not adequately compensate a lawyer who has spent a great deal of time in preparation and has in essence financed the lawsuit.

Costs may be used as a sanction to prevent parties from prolonging court proceedings, to encourage settlements or to discourage improper behaviour. This should not change under a contingency fee system and technical changes will be required to the *Solicitors Act* to achieve this result. For example, section 20(2) states that costs awarded to a client may not be greater than the amount paid by the client to the lawyer. It is very possible that costs may exceed the amount of the contingency fee. To disallow such costs would remove any sanction against a party who is acting improperly. For example, if a defendant refuses a reasonable settlement offer, the court may impose a cost sanction. If the amount of costs is limited to the contingency fee, the defendant would have no incentive to settle.

It is generally up to the lawyer and client to negotiate whether the lawyer will receive a percentage of recovery only, or a percentage of recovery plus costs. If the lawyer is to receive a percentage of recovery only, the percentage will be higher. If the lawyer is receiving a percentage plus costs, the percentage will be lower.

In British Columbia and New Brunswick, a lawyer is prohibited from collecting both costs and a percentage of the recovery as a contingency fee. The British Columbia *Legal Profession Act* states that "a contingent fee agreement must not provide that a lawyer is entitled to receive both a fee based on a proportion of the amount recovered and any portion of an amount awarded as costs in a proceeding or paid as costs in the settlement of a proceeding or an anticipated proceeding."[140] A lawyer may take either the costs recovered or a proportion of the amount recovered as a fee.

In the Yukon, the *Legal Profession Act* excludes costs obtained through a settlement from being included as part of the recovery for the purpose of determining the contingency fee.

> s.68(9) - Where a contingent fee agreement has been entered into and the member receives or is paid, through a settlement, costs in respect of the proceeding or anticipated proceeding in respect of which the contingent fee agreement was entered into, the costs shall not, for the purpose of determining the amount of fees the member is entitled to under the agreement, form part of the recovery, but shall
>
> (a) constitute part of the fees payable to the member, and
>
> (b) be deducted from the amount that would otherwise be payable under the agreement.

None of the other provinces prohibit a lawyer from collecting both costs and a proportion of the amount recovered as a contingency fee.

Option 1: Prohibit lawyers from collecting both costs and a proportion of the amount recovered, unless approved by a court

Pros:

- adds another layer of consumer protection
- would protect clients from being under-compensated

Con:

- if the percentage cap is low and lawyers cannot collect both costs and a proportion of the amount recovered, lawyers may not take cases on a contingency fee basis

[140] S.B.C. 1998, c.9, s.67(2).

Option 2: Permit lawyers and clients to negotiate the inclusion or exclusion of costs from a contingency fee agreement

Pros:

- gives clients and lawyers the freedom to negotiate
- to protect clients, the percentage cap could be set at a lower rate
- reduces risk that it would not be economically rational for lawyers to enter into contingency fee agreements

Con:

- risk that lawyers would be over-compensated and clients would be under-compensated

Recommendation: Prohibit lawyers from collecting both costs and a proportion of the amount recovered, unless approved by a court.

(b) Maximum fees or "caps"

Background

There is a need to balance the lawyer's interest in being fairly compensated for work performed and risk assumed, and the client's interest in receiving a substantial amount of the award or settlement. Under the professional conduct rules of every province, lawyers have a general duty to render a fair and reasonable account. Any account rendered by a lawyer is subject to review by the court or an assessment officer through a standard assessment process. This is true whether the fee is based on an hourly rate or on a contingency fee.

In addition, most provinces impose a specific requirement that contingency fees be reasonable and permit the court to set them aside if they are too high, based on specific criteria.

With these controls in place, none of the provinces have found it necessary to legislate any upper limit on the amount a lawyer may receive under a contingency fee arrangement. The lawyer's percentage will vary depending on the risk, amount of the claim and complexity of case, subject always to the power of the court to adjust the fee. In some provinces, guidelines have been developed as a matter of practice, and contingency fees tend to be in the range of about 20 to 40 %.

In British Columbia, the legislation permits (but does not require) the Law Society to place caps on lawyers' fees. The Law Society has used this power to impose a flat cap in personal injury actions (33.3% for motor vehicle cases and 40% for other personal injury or death cases). These caps are subject to the lawyer's right to apply to the court for a higher fee before the contingency fee contract is entered into.

In the Cumming Report, the authors found that 27% of respondents in British Columbia recommended that the percentage cap be removed.[141] Some of the unsolicited comments they received included:

> "The present 33% restriction denies clients representation in many cases because lawyers settle for too little...."
>
> "The present 33% restriction denies clients representation in many cases because lawyers settle for too little (or refuse the case) if the restrictions make the case uneconomic. Price controls never save money - they only result in a withdrawal (or inferior) goods and services because no one will (or can) operate at a loss."

In 1988, the CBAO recommended that a fixed scale of maximum percentages should be established to act as a general guide for practitioners and to simplify the assessment process.

In 1992, the LSUC's Special Committee on Contingency Fees recommended that a plaintiff's solicitor should be provided with party and party costs plus a contingency based on the actual recovery on a claim. The LSUC recommended that the percentage contingency cap should be set at 20%, subject to the leave of the court to permit increased contingency percentages at the time of the retainer.

Issue: Should Ontario impose a legislative cap on contingency fees?

Option 1: Impose a legislated cap

Pros:
- provides further control on fees in addition to the assessment process and the "reasonableness" standard
- legislated cap may reassure the public that lawyers will not take an unfair amount of clients' awards
- fewer clients may seek a review of their contingency fee contracts, lessening the burden on court resources

Cons:
- inconsistent with approach in other Canadian jurisdictions
- difficult to establish a fair fee based on an arbitrary percentage of amount recovered
- if cap is set below the market rate, lawyers are unlikely to take cases on a contingency basis
- client is already protected by existing assessment process and "reasonableness" standard
- may increase court workload if many lawyers apply to court for fee increases in complex or high risk cases

Option 2: Do not impose a legislated cap

Pros:
- even if government does not impose a cap, the enabling legislation could authorize LSUC to do so, as in British Columbia
- permits broadest freedom of contract between lawyers and clients

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[141] *Cumming Report, supra* note 49 at 63.

- client protected by assessment process and "reasonableness" standard
- consistent with most Canadian jurisdictions
- court resources will not be needed to deal with applications by lawyers for a fee increase at the outset of complex or high risk cases

Cons:
- the absence of caps may be seen by the public as inadequate protection of clients
- without a maximum percentage as a guide, more clients may seek reviews by the courts to determine whether their contracts are fair and reasonable

Option 3: Do not impose a legislated cap but delegate authority to the LSUC to set a cap

Pros:
- the LSUC has expertise about the costs of running a law practice and of carrying the cost of litigation files
- consistent with the LSUC's mandate to govern in the public interest
- LSUC is in the best position to balance the interests of the public and of lawyers
- If the government delegates much of the regulatory authority over contingency fee contracts to the LSUC, then it would be consistent to give the LSUC authority to set a cap

Cons:
- Government has no control over the cap
- Public may perceive that the government is not providing adequate consumer protection
- If most of the consumer protection provisions are set out in the regulations under the *Solicitors Act*, then it is inconsistent and confusing for lawyers and the public to have the cap set out under another statute

Recommendation: Ontario should impose a legislated cap on contingency fees.

(c) Capping levels and mechanisms

Issue: If a cap is imposed, at what level and by what mechanism?

Background

If it is decided to impose a cap, it will be necessary to determine the level of the cap and how the cap will operate.

As indicated above, it is difficult to establish a fair fee based on an arbitrary percentage of the amount recovered, given the complexity of factors that must be considered to calculate the value of a lawyer's services. This difficulty may be dealt with by permitting a lawyer and client to apply to a judge of the Superior Court to seek a percentage fee arrangement above the cap based on the nature, expense, complexity and risk of the claim. Such an application would involve the client and his/her lawyer attending before a judge, in chambers.

The cap must also reflect the market rate (i.e. an hourly rate plus a risk premium and interest on the loan of the lawyer's services), to encourage lawyers to take cases on a contingency fee basis.

There are two basic ways to cap the size of a contingency fee: either by a single maximum percentage applied to all cases, or by a sliding scale of percentages based on the stage of the litigation process or the amount of the award.

In keeping with the recommendation above regarding costs, the cap would be calculated as a percentage of the client's total recovery by settlement or trial judgement less any costs contribution or award, unless otherwise approved by a judge.

Option 1: Sliding scale, based on amount of recovery and time of settlement

The percentage earned by a lawyer would decrease as the size of the award increases. In addition, the lawyer would earn a lower percentage if the case settles before trial. No other province uses this approach.

Pros:
- recognizes that increased workload and risk involved in a trial warrants higher fees
- attempts to avoid excessive fees in cases with large recoveries

Cons:
- may appear unfair, since lawyer gets a greater percentage for small cases
- complexity of fee structure may confuse the client, leading to an increased number of disputes over fees after the case is over
- complexity of fee structure may be more difficult to administer
- may be seen as an incentive for lawyers to go to trial to gain a higher percentage (although this is not likely, given the increased workload and risk involved in going to trial)
- difficult to establish a fair fee based on an arbitrary percentage
- unsophisticated clients may be unaware that they can negotiate the fee

Option 2: Single cap

A single maximum percentage rate that applies to all cases, regardless of the amount of the award or stage at which the case is resolved.

British Columbia has a single cap system set at 33 1/3% for personal injury or death in motor vehicle cases and 40% for all other cases. Lawyers may apply to court for approval to receive compensation above the maximum percentage cap.

Pros:
- flat percentage may encourage the lawyer and client to settle before trial
- if lawyers can apply to court for percentage fee above the cap, they may accept more cases that might otherwise be considered uneconomical
- less complicated for clients and easier to administer than sliding scale

Cons:

- difficult to establish a fair fee based on an arbitrary percentage of amount recovered
- if cap is set below the market rate, lawyers unlikely to take cases on a contingency basis
- unsophisticated clients may be unaware that they can negotiate the fee

Recommendation: Ontario should impose a maximum allowable percentage fee of 33 1/3% of the client's total recovery (excluding any cost contribution or award) by settlement or trial judgement. A contingency fee arrangement greater than the maximum percentage fee must be approved by a judge of the Superior Court by application of the lawyer and client in order for it to be enforceable and if not so approved the retainer is unenforceable.

4. Who Should Review Contingency Fee Contracts – Judges or Assessment Officers?

To protect consumers, accounts based on a contingency fee should be subject to assessment or review in much the same manner as all other accounts rendered by a lawyer.

Most provinces provide specifically for a retrospective review of contingency fee contracts by the court or an assessment officer upon the client's (and in some cases the lawyer's) request.

As noted earlier, lawyers have a general professional duty to ensure that their fees are fair and reasonable. In addition, most provinces impose a specific reasonableness standard on contingency fee contracts and may set aside the fee if it is too high. This requires that lawyers make an adequate assessment of the risk, severity of case, liability and damages before entering the contract.

On review, fees are judged according to circumstances at the time the contract was entered into. They may be set aside if they are unconscionably high at the end of the case (even if they may have been reasonable at the outset).

Option 1: Give judges the authority to review contingency fee contracts?

Pros:

- similar approach taken under the *Class Proceedings Act* where agreements are supervised by judges and judges have the authority to set a lawyer's fee using a risk multiplier or a percentage
- judges have the sophistication and generally have the practice management experience to fairly evaluate a wide range of factors in order to assess the appropriate fee
- will result in development of the common law around contingency fee contracts – this will serve to establish standards for contracts, which will in turn reduce the demand for reviews
- after rendering a judgment, a judge will have an in-depth knowledge of the case and will be in the best position to assess the fees
- will reduce the number of cases that need to be assessed because: (1) fewer cases will be taken on an hourly billing basis and (2) fewer lawyers will enter into vague, unwritten agreements with their clients thus reducing the number of billing disagreements
- the future of the assessment program is uncertain
- approach favored by LSUC, the CBAO and the Advocates' Society

Con:

- added pressure on limited judicial resources

Option 2: Give assessment officers the authority to review contingency fee contracts and judges the right to review only on appeal

Pro:

- contingency fees will be reviewed in the same manner as any other account rendered by a lawyer

Cons:

- concern that assessment officers lack the practice experience to assess a lawyer's fee under a contingency fee arrangement
- assessment officers will not have an in-depth knowledge of the case, making it difficult for them to determine the appropriate fee
- not supported by the CBAO, LSUC or Advocates' Society

Recommendation: Give judges the authority to review contingency fee contracts.

5. When should reviews of contingency fee contracts take place?

The issue here is whether a client should be able to seek a review of a contingency fee contract within a specified period of time after entering into the agreement or whether a review should only be permitted after a bill has been received or a payment made.

A summary of the time limitations placed on reviews of contingency fee contracts in other provinces and territories is set out below:

- British Columbia - within 90 days of making an agreement or terminating it,
- Alberta - within six months of payment,
- Saskatchewan - a client may apply to court at any time for a determination of whether the agreement is fair and reasonable,
- Manitoba - within three months of retaining a lawyer or within three months of making payment,
- New Brunswick - registrar reviews contract upon filing and may review after disposition,
- Nova Scotia – any time after making the agreement until the expiry of six months from the date on which the lawyer has received any part of the fee payable,
- Prince Edward Island - within six months from last date of payment,
- Newfoundland – within six months from last date of payment,
- Yukon - within 90 days of entering into agreement or terminating retainer,
- Northwest Territories – within six months from last date of payment.

In Ontario, a client may seek an assessment of a lawyer's bill within one month from its delivery and, at the discretion of the court, within twelve months after payment of a lawyer's bill (sections 3 and 11 of the *Solicitors Act*). If contingency fees are permitted, then under the current time limitations clients would have the opportunity to seek a review within one month of receiving a bill (this would generally only occur at the end of the case) and, at the discretion of the court, within twelve months after paying a lawyer's bill.

Option 1: Permit clients to seek a review of a contingency fee contract before a judge within a specified period of time after entering into a contingency fee contract, regardless of whether the contract entered into is above or below the maximum percentage fee

Pros:

- assists less sophisticated clients to determine whether a contingency fee agreement is fair and reasonable

Cons:

- potential burden on court resources because clients could seek a review after entering into the contract and then again after the matter has been finalized
- lawyers may be reluctant to commence work on a case until the time for a review has expired, out of concern that a client may want to change the terms of the contract or terminate it
- other, less resource intensive, consumer protection safeguards can be used to ensure that lawyers charge a reasonable fee, such as setting a maximum cap

Option 2: Where the fee is at or below the maximum percentage fee, apply the same time limitations to reviews of contingency fee contracts as those that currently apply to a client assessment of a fee account pursuant to the provisions of the *Solicitors Act* and where the fee is above the maximum percentage fee, set out a specified period of time after the contract is entered into that a lawyer and client must seek a review

Pros:

- creates less of a burden on court resources because clients would generally only seek a review once
- lawyers would be more likely to commence working on a case right away instead of waiting until the time for seeking a review has expired

Cons:

- the public may perceive that there is insufficient consumer protection because a client would not be able to obtain the advice of a court officer regarding the reasonableness of a contingency fee agreement that is set at or below the maximum percentage fee until after the case has been finalized

Recommendation: Give judges the authority to review contingency fee contracts, either on application of both a client and lawyer (within a specified period of time) after entering into a contingency fee agreement that is greater than the maximum percentage fee, or where the fee is at or below the maximum percentage fee on application of a client for review within the same timelines that apply to a client assessment of a fee account pursuant to the provisions of the *Solicitors Act*.

6. Regulating the Form and Content of Contingency Fee Contracts

Most regulatory models require, at a minimum, that the contingency fee contract be in writing, signed by the client, and that a copy of the contract be provided to the client to ensure adequate disclosure of the terms of the agreement.

None of the provinces have a standard form contingency fee contract, because it is almost impossible to develop a standard form contract that could apply to all cases. At one time, LSUC attempted to develop a standard form contingency fee contract, which proved to be too detailed and rigid.

Yet, consumer protection mandates that some basic contractual provisions be incorporated into all contingency fee contracts, including: a description of the claim, basis of the lawyer's remuneration, the client's right to have the contract reviewed and the treatment of costs and disbursements.

Most provinces prescribe terms for contingency fee contracts, and contracts which do not contain the prescribed terms are void. This is to ensure that clients are aware of key aspects of the contract and how to extricate themselves, and to provide certainty, uniformity and simplicity.

Most models also prohibit contingency fee contracts from containing certain terms, such as contracting out of liability for negligence, obtaining the permission of a lawyer before a client discontinues or settles an action, or preventing the client from changing counsel.

How should the form and content of contingency fee contracts be regulated?

Option 1: Standard form contract

Pro:
- provides clients with certainty and uniformity

Cons:
- no other province has a standard form contract
- would be extremely time-consuming and difficult to draft a standard form contract that could apply to all cases
- both LSUC and CBAO have attempted to develop a standard form contract, but gave up
- very inflexible - creates a very onerous restraint on freedom to contract

Option 2: Require all contingency fee contracts to contain prescribed standard terms and to omit prohibited terms

Pros:
- provides assistance to the weaker party in the negotiation (i.e. the client) by ensuring that all contingency fee contracts meet certain minimum standards
- does not inordinately restrain parties' freedom to contract, leaving flexibility to negotiate terms that are specific to individual circumstances
- practically, more feasible than developing a standard form contract
- supported by LSUC, CBAO and Advocates' Society – see Appendix IV for the Committee's specific recommendations regarding the form and content of contingency fee contracts

- consistent with approach in most provinces

Con:
- will require resources to develop and draft standard contract terms

Recommendation: Require all contingency fee contracts to contain prescribed standard terms and to omit prohibited terms.

7. Implementation of Contingency Fees in Ontario

If contingency fees are introduced, it will be necessary to adopt an appropriate regulatory framework. This requires a decision as to whether the government or the LSUC, or some combination, should have responsibility for establishing regulatory controls.

The law societies of Alberta, Saskatchewan and New Brunswick have exclusive authority to regulate contingency fees. In British Columbia, Manitoba and the Yukon, regulatory authority is shared between the respective provincial government and law society.

In Ontario, fee arrangements between lawyers and clients are governed by the *Solicitors Act*. The LSUC does not have authority to determine how much a person should be billed for legal services or to provide redress where a person has been charged excessive fees. Fee disputes between lawyers and their clients are resolved by Assessment Officers, who are officers of the court appointed by the Lieutenant Governor in Council. The LSUC has authority to take disciplinary action against a lawyer where he or she has violated Rule 9(a) of the *Rules of Professional Conduct*, which provides: "The lawyer shall not (a) undertake to act for, charge or accept any amount which is not fully disclosed, fair and reasonable, and when asked by the client to quote a fee shall explain the nature and approximate amount of any anticipated disbursements to be incurred."[142]

What regulatory framework should be adopted in Ontario?

Option 1: Retain complete government control over the regulation of contingency fees

Government would reserve power to make regulations on all aspects of contingency fees (i.e. prohibited areas of practice, percentage cap, fee review, regulation of form and content of contingency fee contracts).

Pros:
- Attorney General retains complete control over safeguards in a matter which requires careful consumer protection
- enables government to make unilateral changes to the scheme, if necessary

Cons:
- requires government resources to set regulations and, if necessary, to modify contingency fee scheme
- inconsistent with Red Tape Commission and government trend towards enhanced self-regulation by professional bodies

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[142] *LSUC Rules*, *supra* note 36.

Option 2: Retain government authority to impose certain controls and delegate authority to the LSUC over details of the regulatory scheme

The government could entrench basic standards in the legislation and regulations, such as prohibited areas of practice, minimum standards for contingency fee contracts and fee review provisions. Government could authorize the LSUC to establish the detailed scheme, such as the imposition and administration of caps (as in British Columbia), and establishment of detailed requirements for contingency fee contracts.

Pros:

- LSUC has expertise to regulate matters relating to the practice of law
- LSUC has duty to act in the public interest and will regulate contingency fees accordingly
- government retains degree of control to set standards and modify aspects of scheme by reserving some regulatory authority to itself
- government also retains supervisory control over LSUC-initiated regulations
- would be supported by the legal profession

Cons:

- government loses some control over detailed regulatory scheme
- somewhat inconsistent with LSUC's regulatory authority because LSUC does not currently regulate fee arrangements

Option 3: Completely delegate authority to LSUC regulate contingency fees

Government would give the LSUC power to initiate regulations on all aspects of contingency fees.

Pros:

- LSUC has the necessary expertise
- LSUC has a duty to act in the public interest and will regulate contingency fees accordingly

Cons:

- government loses control over standards and enforcement of safeguards (except for supervisory authority over LSUC-initiated regulations)
- no guarantee that LSUC will establish standards that are satisfactory to government and government stakeholders (e.g. insurance industry)
- somewhat inconsistent with LSUC's regulatory authority because LSUC does not currently regulate fee arrangements
- government has no ability to modify the scheme, except by statutory amendment

Recommendation: Retain government control over the regulation of contingency fee contracts.

8. Summary of Recommendations:

Therefore, this Committee, after consideration of the practical and legal issues and concerns, makes the following recommendations with respect to the implementation of a contingency fee solicitor and client arrangement in the province of Ontario:

1. Prohibit contingency fees in criminal and quasi-criminal law matters.

2. Prohibit contingency fees in family law matters.

3. Do not prohibit contingency fee contracts with minors and persons under legal disability.
4. Prohibit lawyers from collecting both costs and a proportion of the amount recovered, unless approved by a court.

5. Impose a legislated cap on contingency fees.

6. Impose a maximum allowable percentage fee of 33 1/3% of the client's total recovery (excluding any cost contribution or award) by settlement or trial judgement. A contingency fee arrangement greater than the maximum percentage fee must be approved by a judge of the Superior Court by application of the lawyer and client in order for it to be enforceable and if not so approved the retainer is unenforceable.

7. Give judges the authority to review contingency fee contracts.

8. Impose the following timelines on judicial review of contingency fee contracts: either on application of both a client and lawyer (within a specified period of time) after entering into a contingency fee agreement that is greater than the maximum percentage fee, or where the fee is at or below the maximum percentage fee on application of a client for review within the same timelines that apply to a client assessment of a fee account pursuant to the provisions of the *Solicitors Act* .

9. Require all contingency fee contracts to contain prescribed standard terms and to omit prohibited terms.

10. Retain government control over the regulation of contingency fee contracts.

APPENDIX I

CONTINGENCY FEES
CANADIAN BAR ASSOCIATION - ONTARIO AND LAW SOCIETY OF UPPER CANADA MODELS

	Law Society of Upper Canada (1992)	Canadian Bar Association (Ontario) (1988)
Restrictions on area of practice	prohibited: ·family law, except for collection of support arrears ·criminal law ·administrative proceedings where remedy sought is not damages or other pecuniary compensation	prohibited: ·family law ·criminal law
Restrictions on client		·contracts with minors and persons under legal disability would be allowed because there are safeguards for these individuals (litigation guardian), subject to development of rules
Regulation of the lawyer's fee	·costs plus 20%: lawyer obtains party-and-party costs plus agreed-upon percentage of the award. If costs awarded are higher than party-and-party costs, excess goes to client ·fee is capped at 20%; however, parties may apply to court for increased contingency fee at time of retainer ·whether disbursements would be part of contingency or paid by client is determined by lawyer and client at time of retainer	·a fixed scale of maximum percentages to be developed through consultation with local & county law associations ·parties may contract up to maximum percentage ·percentage is applied to gross recovery, including general and special damages, pre- and post-judgement interest, excluding costs, punitive damages ·contract could provide for a fixed sum payable in lieu of percentage where claim is non-monetary ·client is liable for disbursements, court costs and other expenses of litigation, even if unsuccessful
Regulation of the contract form	·enforceable only if written ·if there is no written contract and client is successful, then lawyer may only charge client on *quantum meruit* basis ·no provision for standard form contract	·enforceable only if written ·standard form contract to be developed and approved by LSUC and CBAO ·contract must be signed by both parties and witnessed ·client must receive copy of contract; if client has no copy, then contract is not enforceable against him/her
Filing with court ahead of time	·no filing requirement	·no filing requirement
Review of the fee	·no specific procedure recommended ·client may apply to court for retrospective review of agreement ·court determines whether agreement was fair and reasonable at time it was entered ·client may request further review by court to determine whether ultimate fee turned out to be *unconscionably* high	·client may request retrospective review by court; court will only interfere with contract if special circumstances are shown ·court will determine validity of contract, and may modify contract based on inequity in all of circumstances ·assessment officer becomes involved only when contract is declared invalid
Termination of contingency fee contract	·no mechanism recommended	·if client terminates contract, lawyer's account is assessed in accordance with rules ·if lawyer terminates contract, no fees may be recovered if the matter has not been resolved
Source of authority	·would be put into Rules of Practice or *Solicitors Act*	

APPENDIX II

CONTINGENCY FEES IN CANADA

PROVINCE	Restrictions on area of practice	Restrictions on clients	Regulation of the lawyer's fee	Regulation of the contract form	Filing with court ahead of time	Review of the fee	Termination of contingency fee contract	Source of Authority
British Columbia	Prohibited in child custody and access matters. Allowed in family dispute if judge approves.	None	Law Society maximum: -33 1/3 % for personal injury or wrongful death in motor vehicle accident -40% of amount recovered for other claims. Lawyer may apply to court for compensation above Law Society maximum, but must apply before entering contract & give client 5 days written notice. If client and lawyer agree & court finds proposed fee reasonable, court may approve contract. **Lawyer may not receive both percentage of recovery and portion of awarded costs. Lawyer has option of taking costs recovered instead of proportion of amount recovered.**	**MUST:** -be in writing -state that client may apply to registrar for review of agreement within 90 days after agreement made or retainer between solicitor and client terminated, even if payment made -state that, according to Law Society, there is maximum compensation lawyer may claim, and that maximum is subject to Supreme Court providing higher compensation -statement of Law Society's rule if lawyer takes costs recovered instead of amount recovered **CANNOT:** -relieve lawyer from liability for negligence -require lawyer's consent before matter can be abandoned, discontinued, or settled -prevent client from changing counsel before conclusion of contract	Not required.	Client may apply to Registrar for review within 90 days after contract made or retainer terminated, even if payment already made. Registrar may modify or cancel contract if found to be unfair or unreasonable at time contract made. If contract cancelled, lawyer may be required to prepare bill for taxation, or Registrar may tax costs, fees, charges, and disbursements as though there were no agreement. Appeal from decision of Registrar to court.	Not specified.	*Legal Profession Act*, SBC 1998, c.9 (current to Apr.10, 2000) Law Society Rules, Part 8 (current to Feb.7, 2000)
Alberta	Prohibited in criminal, divorce and custody matters. Allowed in family property and support matters.	None	No maximum.	**MUST:** -be in writing -be signed by client or agent -have names and addresses of client and lawyer -state nature of claim and contingency -state whether and to what extent client liable to pay compensation otherwise than amounts collected by lawyer -state that reasonable contingent compensation to be paid for services	Must file with clerk of judicial district in which lawyer practices within 15 days after signing agreement. If not filed, lawyer entitled to compensation as would be payable	Client may apply to clerk for review within 6 months from last date lawyer received fee. At any time while agreement before clerk, or within 15 days of clerk's decision on review, clerk may (shall at request of client) refer agreement to Court of Queen's Bench. Clerk or judge may	If lawyer dies or becomes incapable of acting before completion of agreement, either party can apply to taxing officer to determine amount due. If client discharges lawyer, lawyer considered to be incapable of acting. If client personally settles any matter subject to a contingent fee arrangement, client deemed to	Rules of Court, Rules 613-626 (current to Sept. 1998) Code of Professional Conduct, Chapter 13 (current to Sept. 1998) *Judicature Act*, RSA 1980, c.J-1, s.46

PROVINCE	Restrictions on area of practice	Restrictions on clients	Regulation of the lawyer's fee	Regulation of the contract form	Filing with court ahead of time	Review of the fee	Termination of contingency fee contract	Source of Authority
				-state maximum amount or rate compensation not to exceed -state that agreement may be reviewed by court clerk at client's request and may, at the instance of the clerk or the client, be further reviewed by judge and either judge or clerk may vary, modify or disallow agreement **CANNOT:** -relieve lawyer from liability for negligence -require lawyer's consent before matter can be abandoned, discontinued, or settled -prevent client from changing counsel before conclusion of contract	in the absence of contingency agreement.	approve, vary, modify, or disallow agreement. If agreement disallowed, lawyer entitled to compensation as would be payable without contingency agreement.	have discharged lawyer. If client discontinues or abandons any matter subject to an agreement without discharging lawyer, lawyer may apply to tax costs. Taxing officer has power to refuse any compensation until disposition of matter.	(current to April 14, 2000)
Saskatchewan	Prohibited in child custody and access matters. Allowed in family dispute if court approves.	None	No maximum.	**MUST:** -be in writing -be signed by each party -state that any party may apply to court for determination of whether contract is fair and reasonable -deliver copy to client **CANNOT:** -relieve lawyer from liability for negligence -require lawyer's consent before matter can be abandoned, discontinued, or settled -prevent client from changing counsel before conclusion of contract	Not required.	Client may apply to court for determination as to whether agreement is fair and reasonable.	Not specified.	Law Society Rules, Part 18 (current to Sept. 1998) Code of Professional Conduct (current to Jan. 21, 2000)
Manitoba	None	None	No maximum.	**MUST:** -be in writing -provide client with copy of contract and appropriate statutory provisions regarding review If lawyer does not provide a copy, then lawyer entitled only to compensation that	When an action is started, lawyer must file copy of contingency fee contract with court where action is started [r.638A(2)].	Within six months of payment, client may apply to Court of Queen's Bench for declaration that contract is not fair and reasonable. If judge finds not fair and reasonable, shall declare void and order	Not specified.	*Law Society Act*, RSM 1987, c.L100 (current to Sept. 1999) Code of Professional Conduct (current to Sept. 1998)

PROVINCE	Restrictions on area of practice	Restrictions on clients	Regulation of the lawyer's fee	Regulation of the contract form	Filing with court ahead of time	Review of the fee	Termination of contingency fee contract	Source of Authority
				would have been payable in the absence of a contingency fee contract.	When an action is defended, lawyer must file contract with court at time of first appearance [r.638A(3)].	costs, fees, charges and disbursements to be taxed in same manner as if no contingency agreement entered into.		Queens Bench Rules
Quebec Note: lawyers in Quebec are not expressly prohibited nor permitted to enter into contingent fee agreements. Any fee arrangement between a lawyer and his client is subject to the general rules from the Code of ethics of advocates which deal with determination and payment of fees.	Not specified in Code of ethics of advocates. Note, however, that a contingency agreement in a family matter was not permitted by the Court of Appeal (Desjardins c. Ducharme, C.A. Montreal, no 500-09-008619-991, March 30th 2000, Baudoin j.)	Not specified in the Code of ethics of advocates.	The advocate must charge and accept fair and reasonable fees. In determining fees, advocate must take following factors into account: a. his experience b. time devoted to the matter c. difficulty of question involved d. importance of matter e. responsibility assumed f. performance of unusual services or services requiring exceptional competence or celerity g. result obtained h. judicial and extrajudicial fees fixed in the tariffs	The advocate must provide his client with all the explanations necessary to the understanding of his statement of fees and the terms and conditions of payment, except where he has concluded a written agreement with his client to receive lump-sum payment or where he may reasonably assume that his client is already informed thereof.	Not required.	By Trustees of barreau du Quebec.	Not specified.	Code of Ethics of advocates (R.S.Q., c. B-1, r.1, s.8)
New Brunswick	Allowed in child custody or access, matrimonial dispute or criminal or quasi-criminal case if court approves.	None	No maximum. **Lawyer may not receive both percentage of recovery and portion of awarded costs.**	**MUST:** -be in writing -have names of client (or agent) and lawyer -description of legal services to be performed -state nature of cause and contingency upon which future services, fees, charges, and disbursements are to be paid, and basis for such payment	Not required.	Client may apply to reviewing officer for review within 90 days after contract made or retainer terminated, even if payment already made. Reviewing officer may modify or cancel contract if found to be unfair or unreasonable at time contract made. If	Not specified.	Professional Conduct Handbook, Part E *Law Society Act*, S.N.B. 1996 (current to Apr. 2000)

PROVINCE	Restrictions on area of practice	Restrictions on clients	Regulation of the lawyer's fee	Regulation of the contract form	Filing with court ahead of time	Review of the fee	Termination of contingency fee contract	Source of Authority
				-state that person entitled to copy of agreement at time of execution **CANNOT:** -relieve lawyer from liability for negligence		contract cancelled, lawyer may be required to prepare bill for taxation, or reviewing officer may tax costs, fees, charges, and disbursements as though there were no agreement.		
Nova Scotia	None	None	No maximum.	**MUST:** -be in writing -be signed by client or agent -have names and addresses of client and lawyer -state nature of claim and contingency -state whether and to what extent client liable to pay compensation otherwise than amounts collected by lawyer -state that reasonable contingent compensation to be paid for services -state maximum amount or rate compensation not to exceed -state that agreement may be reviewed by court clerk at client's request and may, at the instance of the clerk or the client, be further reviewed by judge and either judge or clerk may vary, modify or disallow agreement	Must file with prothonotary within 10 days of signing contract. If not filed, lawyer entitled to compensation as would be payable in the absence of contingency agreement.	Client may apply to taxing officer for review within 6 months from last date lawyer received fee. At any time while agreement before taxing master, or within 10 days of clerk's decision on review, clerk may (shall at request of client) refer agreement to court. Taxing master or judge may approve, vary, modify, or disallow agreement. If agreement disallowed, lawyer entitled to compensation as would be payable without contingency agreement.	If lawyer dies or becomes incapable of acting before completion of agreement, either party can apply to taxing officer to determine amount due. If client discharges lawyer, lawyer considered to be incapable of acting. If client personally settles any matter subject to a contingent fee arrangement, client deemed to have discharged lawyer. If client discontinues or abandons any matter subject to an agreement without discharging lawyer, lawyer may apply to tax costs. Taxing officer has power to refuse any compensation until disposition of matter.	Legal Ethics and Professional Conduct Handbook, s.12.11 Civil Procedure Rules, ss.63.17-63.20 (current to Sept. 1998) Regulations of the Nova Scotia Barristers' Society, paragraph 51
Prince Edward Island	None	None	No maximum.	**MUST:** -be in writing -be signed by client or agent -have names and addresses of client and lawyer -state nature of claim and contingency -state whether and to what extent client liable to pay compensation otherwise than amounts collected by lawyer -state that reasonable contingent compensation to be paid for services -state maximum amount or rate compensation not to exceed	Must file with court within 10 days of signing contract. If not filed, lawyer entitled to compensation that would be payable in the absence of contingency fee agreement.	Client may apply to Prothonotary for review within 6 months from last date lawyer received fee. At any time after Prothonotary given decision on review, Prothonotary may (shall at request of client) refer agreement to court. Prothonotary or judge may approve, vary, modify, or disallow agreement. If agreement	If lawyer dies or becomes incapable of acting before completion of agreement, either party can apply to taxing officer to determine amount due. If client discharges lawyer, lawyer considered to be incapable of acting. If client personally settles any matter subject to a contingent fee arrangement, client deemed to have discharged lawyer. If client discontinues or abandons	Rules of Court, R57

PROVINCE	Restrictions on area of practice	Restrictions on clients	Regulation of the lawyer's fee	Regulation of the contract form	Filing with court ahead of time	Review of the fee	Termination of contingency fee contract	Source of Authority
				-state that agreement may be reviewed by Prothonotary at client's request and may, at the instance of the Prothonotary or the client, be further reviewed by judge and either judge or Prothonotary may vary, modify or disallow agreement		disallowed, lawyer entitled to compensation as would be payable without contingency agreement.	any matter subject to an agreement without discharging lawyer, lawyer may apply to tax costs. Taxing officer has power to refuse any compensation until disposition of matter.	
Newfoundland	None	None	No maximum.	**MUST:** -be in writing -be signed by client or agent -have names and addresses of client and lawyer -state nature of claim and contingency -state whether and to what extent client liable to pay compensation otherwise than amounts collected by lawyer -state that reasonable contingent compensation to be paid for services -state maximum amount or rate compensation not to exceed -state that agreement may be reviewed by taxing officer at client's request and may, at the instance of the taxing officer or the client, be further reviewed by judge, and either judge or taxing officer may vary, modify or disallow agreement	Must file with court within 10 days of signing contract. If not filed, then lawyer is entitled to compensation that lawyer would have received without contingency fee agreement.	Client may apply to taxing officer for review within 6 months from last date lawyer received fee. At any time while agreement before taxing master, or within 10 days of clerk's decision on review, clerk may (shall at request of client) refer agreement to court. Taxing master or judge may approve, vary, modify, or disallow agreement. If agreement disallowed, lawyer entitled to compensation as would be payable without contingency agreement.	Not specified.	Rules of Court, ss.55.16-55.18
Northwest Territories	None	None	No maximum.	**MUST:** -be in writing -be signed by client or agent -have names and addresses of client and lawyer -state nature of claim and contingency -state whether and to what extent client liable to pay compensation otherwise than amounts collected by lawyer -state that reasonable contingent compensation to be paid for services -state maximum amount or rate compensation not to exceed -state that agreement may be reviewed by court clerk and may, at the instance of the	Must file with court within 15 days of signing contract. If not filed, then lawyer is entitled to compensation that lawyer would have received without contingency fee agreement.	Client may apply to clerk for review within 6 months from last date lawyer received fee. At any time while agreement before clerk, or within 15 days of clerk's decision on review, clerk may (shall at request of client) refer agreement to Court. Clerk or judge may approve, vary, modify, or disallow agreement. If agreement disallowed, lawyer entitled to compensation as would be	If lawyer dies or becomes incapable of acting before completion of agreement, or where client changes or discharges solicitor, either party can apply to taxing officer to determine amount due. If client personally settles any matter that is subject to a contingent fee arrangement, client deemed to have discharged lawyer. If client discontinues or abandons any matter subject to an	Rules of Court, R 653-663

PROVINCE	Restrictions on area of practice	Restrictions on clients	Regulation of the lawyer's fee	Regulation of the contract form	Filing with court ahead of time	Review of the fee	Termination of contingency fee contract	Source of Authority
				clerk or the client, be further reviewed by judge and either judge or clerk may vary, modify or disallow agreement **CANNOT:** -relieve lawyer from liability for negligence -require lawyer's consent before matter can be abandoned, discontinued, or settled -prevent client from changing counsel before conclusion of contract		payable without contingency agreement.	agreement without discharging lawyer, lawyer may apply to tax costs. Taxing officer has power to refuse any compensation until disposition of matter.	
Yukon	Prohibited in proceedings relating to: -*Family Property and Support Act* or *Divorce Act*, or for any other matrimonial cause or property of an infant -property of any person under legal disability -distribution of estate of a deceased person or partition of property -any other matter described in rules	Prohibited: person under legal disability	**Costs received through settlement do not form part of recovery, but are part of fees payable to lawyer and are deducted from amount that would otherwise be payable under agreement.**	**MUST:** -be in writing -state percentage -state that either client or lawyer may apply to have contract reviewed by clerk of Supreme Court **CANNOT:** -relieve lawyer from liability for negligence	Not required.	Within 90 days after contract made or retainer terminated, client can apply to clerk of Supreme Court for review of contract, even if payment already made. Clerk may modify or cancel contract if found to be unfair or unreasonable at time contract made. If contract cancelled, lawyer may be required to prepare bill for taxation, or Clerk may tax costs, fees, charges, and disbursements as though there were no agreement. Appeal from decision of clerk to Supreme Court.	Not specified.	*Legal Profession Act*, RSY 1986, c. 100, s.68 (current to Dec. 1999) Code of Professional Conduct, ss.10-13

APPENDIX III

CONTINGENY FEES:
COMPARISON OF AMERICAN CONTINGENCY FEE SCHEMES

Jurisdiction	Regulatory framework	Prohibited areas of practice or clients	Caps on lawyer's fee	Regulation of contract form and content
American Bar Association	ABA Model Rules of Professional Responsibility	Areas of practice: . family . criminal Clients: . none	. none	For all contingency fee contracts: . must be in writing . must state the method for determining the fee . must state the inclusion or exclusion of expenses . at the conclusion of the matter, the lawyer must provide a statement indicating the outcome, the remittance to the client, and its determination
California	Statute California Rules of Professional Conduct	. none	For medical malpractice cases: . 40% of first $50,000 . 33 1/3% of next $50,000 . 25% of next 500,000 . 15% of amounts over $600,000 For claims between merchants: . 20% of first $300 . 18% of next $1,700 . 13% of amounts over $2,000 For other cases: . no cap	For all contingency fee contracts except in workers' compensation benefits cases and claims between merchants: . must be in writing . must state the rate . must state inclusion or exclusions of expenses . must state that the fee is negotiable . if the lawyer does not have malpractice insurance, a statement to that effect . a duplicate, signed copy must be sent to the client
Florida	Rules Regulating the Florida Bar, based on the ABA Model Rules of Professional Conduct	Areas of practice: . family . criminal Clients: . no restrictions	For tort cases not involving commercial litigation: . before answer filed: . 33 1/3% of first $1 million . 30% of next $1 million . 20% of amounts over $2 million . through trial: . 40% of first $1 million . 30% of next $1 million	For all contingency fee agreements: . must be in writing . must state the method of determining fee . must state inclusion or exclusion of expenses For tort cases not involving commercial litigation: . must include a statutory clause ensuring

Jurisdiction	Regulatory framework	Prohibited areas of practice or clients	Caps on lawyer's fee	Regulation of contract form and content
			. 20% of amounts over $2 million . if liability admitted and damages only at issue: . 33 1/3% of first $1 million . 20% of next $1 million . 15% of amount over $2 million For other cases: . no cap	that the client has received the statutory Statement of Client's Rights, which provides consumer information for the client . must include a statutory clause stating the right of a client to cancel the contract within 3 days at no penalty . at conclusion of the matter, the lawyer must provide a closing statement itemizing costs, expenses, and fees
Illinois	Illinois Rules of Professional Conduct, based on the ABA Model Rules of Professional Conduct. Statutory modifications	Areas of practice: . family, except for matters subsequent to final judgment, such as enforcement . criminal Clients: . no restrictions	For medical malpractice cases: . 33 1/3% of first $150,000 recovered . 25% of next $850,000 . 20% of amounts over $1 million For claims against the government (with numerous exceptions): . 20% of the amount above the amount that is undisputed For other cases: . no cap	For all contingency fee agreements: . must be in writing . must state the method of determining fee . must state inclusion or exclusion of expenses . at the conclusion of the matter, the lawyer must provide a statement indicating the outcome, the remittance to the client, and its determination
New York	New York Code of Professional Responsibility, based on the ABA Model Code of Professional Responsibility Statute	.Areas of practice: . family . criminal Clients: . infants -- no payment may be made to a lawyer under a contingency fee contract with an infant except with the approval of a judge after recovery or settlement	For medical malpractice cases: . 30% of first $250,000 . 25% of next $250,000 . 20% of next $500,000 . 15% of next $250,000 . 10% of amounts over $1,250,000 For other cases: . no cap	For all contingency fee agreements: . after the lawyer has been employed, lawyer must provide a statement indicating the method of determining fee and inclusion or exclusion of expenses . at conclusion of the matter, lawyer must provide a statement indicating the outcome, the remittance to the client, and the method of its determination

APPENDIX IV

RECOMMENDED FORM AND CONTENT OF CONTINGENCY FEE CONTRACTS

RECOMMENDED FORM OF CONTRACT

- in writing and entitled "Contingency Fee Retainer Agreement"
- signed by both client and lawyer with witness signature as well
- originally executed copy to be given to the client and copy kept by lawyer

RECOMMENDED STANDARD PROVISIONS

- state name ,address and phone number of the lawyer and the client
- state basic type and nature of client's claim
- state that a contingency fee retainer is only one of several available arrangements to retain a lawyer and that client was aware or was made aware that there are other options such as an hourly rated retainer and that after having discussed other options client has chosen this form of retainer and understands that all usual protections and controls on retainers between a lawyer and client as defined by the LSUC and the common law apply to this agreement where relevant.
- state that the maximum allowable percentage fee that a lawyer may claim (unless a judge approves an increase above the maximum) is 33.33% of the client's total recovery (excluding any cost contribution or award) by settlement or trial judgement.. Further that a lower percentage may be negotiated according to the circumstances of each case and that the agreed upon contingency fee in this agreement is ____ %.
- state that a fee arrangement greater than 33.33% must be approved by a judge of the Superior Court by application of the lawyer and client within X days of the agreement being signed in order for it to be enforceable and if not so approved the retainer is unenforceable and give an example of what actual amount the fee might be depending on the gross recovery and the arrangements agreed to in this retainer.
- state specifically that unless provided otherwise in detail in the retainer agreement the client is responsible on an ongoing basis for all disbursements and taxes payable during or at the conclusion of the case. Then state that if the lawyer pays disbursements and /or taxes during the case the lawyer is entitled to be reimbursed for those expenditures as a first charge on any settlement or judgement monies.
- state that unless otherwise ordered by a judge, a client is entitled to receive any costs contribution or award (on a party-and-party or solicitor-client scale) where the client is the party entitled to costs, and likewise a client is responsible for paying any costs contribution or award (on a party-and-party or solicitor-client scale) where the client

is the party liable to pay costs.

- state that the client agrees and directs that all settlement or trial judgement monies paid shall be directed to be paid to the lawyer's office to be held in trust by the lawyer subject to the terms of this agreement.
- state a simple example of how a contingency fee is calculated.
- state that client always has the right within 30 days of receiving the lawyers account to ask the Superior Court to review and approve this retainer agreement and the amount in the account to be recovered by the lawyer after the case has been finalized and an account rendered to the client.
- state when and how the client and the lawyer may terminate the contract and the consequences of such termination for each of them, such as the client can terminate but must then pay the lawyer for his or her time and expenses to that date to be agreed upon or assessed and if the lawyer terminates he or she loses any right to a fee for time spent on file to that point but can recover any expenses incurred on the case to the date of termination.
- state that client retains and has right to ultimately make all critical decisions regarding the conduct of and the settlement of the case

PROVISIONS NOT ALLOWED TO BE IN CONTINGENCY FEE RETAINER

- lawyer may not require his/her consent before a claim may be abandoned, discontinued or settled at the instructions of the client (to ensure that the decision remains that of the client)
- lawyer may not prevent the client from terminating the lawyer or changing solicitors.
- lawyer may not split the fee with any other person, except as provided by the Rules of Professional Conduct